2006

Solomon Lee Ford v. State of Utah : Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

SOLOMON LEE FORD,

Petitioner/Appellee,

vs.

STATE OF UTAH,

Respondent/Appellant.

Utah Supreme Court No. 20060720

Related Appeal No. 20070587

BRIEF OF APPELLEE

Appeal From the Final Judgment of the Third District Court for Salt Lake County, State of Utah

Thomas B. Brunker
Assistant Attorney General
Mark Shurtleff
Utah Attorney General
Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Attorneys for Appellant

Troy L. Booher (9419)
Kimberly A. Neville (9067)
Emily Smith Hoffman (10212)
Katherine Carreau (11043)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900

Attorneys for Appellee

IN THE UTAH SUPREME COURT

SOLOMON LEE FORD,

Petitioner/Appellee,

vs.

STATE OF UTAH,

Respondent/Appellant.

Utah Supreme Court No. 20060720

Related Appeal No. 20070587

BRIEF OF APPELLEE

Appeal From the Final Judgment of the Third District Court for Salt Lake County, State of Utah

Thomas B. Brunker
Assistant Attorney General
Mark Shurtleff
Utah Attorney General
Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Attorneys for Appellant

Troy L. Booher (9419)
Kimberly A. Neville (9067)
Emily Smith Hoffman (10212)
Katherine Carreau (11043)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900

Attorneys for Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

CONSTITUTIONAL PROVISIONS

JURISDICTION

The Court has jurisdiction pursuant to Utah Code section 78-2a-3(2)(f).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

The State has filed two separate opening briefs, one prior to remand and one following remand. Solomon Ford will cite to the first brief with "First Br." and the second brief with "Second Br."

I. Issues Presented in the State's First Opening Brief

Mr. Ford disputes the State's characterization of the issues in the first brief. Mr. Ford will therefore restate the issues after providing some context.

Mr. Ford served 13 years of a 15-year sentence after being convicted of possession of a dangerous weapon by a restricted person. (R. 52, 340.) Specifically, while Mr. Ford was paroled, officers found (i) a handgun holster in an apartment next door to where Mr. Ford's girlfriend lived and (ii) parts of a shotgun, but not a barrel—insufficient parts to permit its use as a weapon—in a gym bag in his girlfriend's apartment.[1]

In 1999, Mr. Ford—acting pro se—unsuccessfully attempted to raise the constitutional issue that his conviction is void because he was denied a preliminary hearing by a magistrate as required by article I, section 13. (R. 294:4, 15.) Judge Medley construed his 1999 petition as raising a separate issue concerning only the unconstitutional delegation of judicial authority and denied the petition as procedurally barred under the Post-Conviction Relief Act ("PCRA"). (First Br. at 4.)

In 2005, Mr. Ford—still acting pro se—filed the current petition with the district court raising his article I, section 13 argument, which the district court recognized as

[1] If the Court concludes that the record of Mr. Ford's original trial becomes relevant to this appeal, Mr. Ford can supply a copy of that transcript.

such. (R. 4, 147.) In the first opening brief, the State construes Mr. Ford's petition as raising merely an unconstitutional delegation argument—the issue Judge Medley ruled he was procedurally barred from considering in 1999—and contends that this argument is procedurally barred under the PCRA. While Mr. Ford does raise an unconstitutional delegation argument under article V, section 1,[2] and article VIII, section 1,[3] Mr. Ford's primary argument is that a magistrate did not preside over his preliminary hearing, as constitutionally required under article I, section 13,[4] an entirely separate constitutional violation. Until the district court addressed the article I, section 13 issue in this proceeding, it had never before been recognized in any of Mr. Ford's petitions.

Issue 1: Whether the article I, section 13 right to a preliminary hearing by magistrate—a substitute for the ancient right to indictment by grand jury—requires that a member of the judicial branch determine whether probable cause exists.

Issue 2: Whether the Utah Constitution permits the legislature to delegate authority to conduct preliminary hearings to someone not a member of the judicial branch.

Standard of Review: The Court reviews interpretations of the Utah Constitution for correctness. Grand County v. Emery County, 2002 UT 57, ¶6, 52 P.3d 1148.

---

[2] "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Utah Const. art. V, § 1.

[3] "The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as a district court, and in such other courts as the Legislature by statute may establish." Utah Const. art. VIII, §1.

[4] "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate." Utah Const. art I, § 13.

II. Issues Raised in the State's Second Opening Brief

For the most part, Mr. Ford agrees with the State's framing of the three right to counsel issues presented in the second opening brief, but not one of the standards of review. The State correctly notes that all three issues concern very narrow circumstances in which (i) a district court has granted a habeas petition (or petition for post-conviction relief); (ii) in granting the petition, the court has vacated the legal basis of confinement; and (iii) the State has decided to appeal the district court's ruling. (Second Br. at 2.)

The State construes the scope of the statutory right to counsel as co-extensive with the federal constitutional right to counsel. Mr. Ford therefore will address the scope of the constitutional rights to counsel before addressing the statutory right to counsel.

Issue 3: Whether the rights to counsel and to due process under the United States Constitution require that individual states must provide counsel to the indigent when a state employs the judicial process to alter the status quo and to acquire the legal basis to imprison an indigent individual.

Standard of Review: The Court reviews interpretations of the United States Constitution for correctness. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995).

Issue 4: Whether the district court abused its discretion by appointing counsel under the Utah Constitution where the State is employing the judicial process to alter the status quo and to acquire the legal basis to imprison an indigent individual.

Standard of Review: The question of whether to appoint counsel under article I, section 12 is "left to the discretion of the trial judge, with his action subject to review for abuse of discretion." State v. Eichler, 483 P.2d 887, 889 (Utah 1971).

Issue 5: Whether the Indigent Defense Act requires the State to provide counsel to the indigent when the State employs the judicial process to alter the status quo and to acquire the legal basis to imprison an indigent.

Standard of Review: The Court reviews interpretations of statutes for correctness. MacFarlane v. State Tax Comm'n, 2006 UT 25, ¶9, 134 P.3d 1116.

DETERMINATIVE PROVISIONS

Utah Constitution, article I, section 5

> The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

Utah Constitution, article I, section 7

> No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, article I, section 12

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . . In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed.

Utah Constitution, article I, section 13:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment.

Utah Constitution, article V, section 1

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Constitution, article VIII, section 1:

> The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as a district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and other such courts designated by statute shall be courts of record. Courts of record shall also be established by statute.

Utah Constitution, article VIII, section 3:

> The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

Amendment VI to the United States Constitution

> In all criminal prosecutions, the accused shall . . . have the Assistance of counsel for his defense.

Amendment XIV to the United States Constitution

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the State's imprisonment of a man for 13 years without first affording him his constitutional right to a preliminary hearing before a magistrate, a right enshrined in article I, section 13 of the Utah Constitution. Mr. Ford's hearing was conducted by a court commissioner, someone the State concedes had no authority to exercise judicial powers. The underlying basis for Mr. Ford's conviction is thin enough—possession of a dangerous weapon, where no functional weapon was ever found, let alone produced as evidence—to make the denial of this right significant. As the State recognizes, absent an article I, section 13 preliminary hearing, the original trial court could not have obtained subject matter jurisdiction. This Court has inherent authority under article VIII, section 3, and the habeas corpus provision of article I, section 5, to address the merits of a petition challenging subject matter jurisdiction.

This case also presents the question of whether the State has an obligation to provide paid legal counsel to an indigent person when the State employs the judicial process to obtain the legal authority to imprison that person. After the district court granted Mr. Ford's habeas petition and vacated his sentence, the State had two avenues for dealing with Mr. Ford. First, it could have accepted the district court's proffered opportunity to re-try Mr. Ford, if it could first establish probable cause in a preliminary hearing before a magistrate. (R. 240.) Second, the State could have dropped the case because Mr. Ford had already spent 13 (of a possible 15) years in prison for possession of a weapon. The State chose to pursue a third route—to prosecute this appeal and to seek the authority to send Mr. Ford, who is now free, back to prison.

II. Course of Proceedings

On June 3, 2005, Mr. Ford—acting pro se—filed a pleading he titled "Relief From a Void Judgment and Order Rule 60(b)(4)." (R. 1.) The district court and the State construed this pleading as a petition to vacate his conviction on the ground that the original trial court lacked subject matter jurisdiction. (R. 40, 144.)

On October 19, 2005, the State moved to dismiss the petition because it was procedurally barred under the under the Post-Conviction Remedies Act, Utah Code sections 78-35a-101, et seq. (R. 43-48.) Mr. Ford represented himself in opposing the motion. (R. 34.) On January 9, 2006, the district court held a hearing on the motion, after which it ordered the State to address the merits of the petition. (R. 101, 294:16-17.) In its memorandum addressing the merits, the State argued that the commissioner presiding over Mr. Ford's preliminary hearing had de facto judicial authority and was authorized by the legislature to conduct such hearings. (R. 102-113.) Mr. Ford—again acting pro se—responded by arguing that because a member of the judicial branch did not conduct the preliminary hearing, his conviction is void, and this argument cannot be procedurally barred because it concerns subject matter jurisdiction. (R. 122-26.)

On April 25, 2006, the district court granted Mr. Ford's petition. (R. 144.) In its decision, the district court first addressed the jurisdictional question in the context of article I, section 13's requirement that a magistrate conduct the preliminary hearing. (R. 147.) The district court recognized that the Judicial Council had not authorized commissioners to conduct preliminary hearings. (R. 148.) The court then rejected the State's argument that this problem could be overcome with the doctrines of de facto authority and waiver, concluding that the failure to provide an article I, section 13 hearing

by a judicial officer precluded the original trial court from obtaining subject matter jurisdiction, a defect not subject to waiver under the PCRA.[5] (R. 150-51.)

After granting the petition, the district court appointed counsel from the Salt Lake Legal Defenders Association ("SLDA") to represent Mr. Ford and to address whether Mr. Ford was entitled only to a new trial or to immediate release. (R. 152.) On June 21, 2006, the district court—assuming the State would not find 13 years sufficient punishment for possession of a dangerous weapon—ordered the State either (i) to provide Mr. Ford a preliminary hearing and new trial or (ii) to release him immediately. (R. 240.) On June 26, 2006, the State sought a third option by filing a motion to stay the district court's judgment pending appeal. (R. 246.) On August 1, 2006, the district court denied the motion to stay. (R. 277.) The State then unsuccessfully sought to have this Court stay the judgment. (R. 280.) On August 15, 2006, the district court ordered Mr. Ford released from prison. (R. 284.) On July 10, 2006, the State filed a notice of appeal, which is deemed to have been filed on August 15, 2006, when the final judgment was entered. (R. 255.)

After the State filed its first opening brief, this Court remanded the case so that SLDA could withdraw as counsel for Mr. Ford due to a conflict of interest. (R. 295-96.) On February 26, 2007, the district court appointed Jennifer Gowans and Randall Spencer

---

[5] While it is somewhat difficult to separate the district court's article I, section 13 analysis from its unconstitutional delegation analysis, this confusion is irrelevant. (First Br. at 16.) "It is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." Bailey v. Bayles, 2002 UT 58,¶10, 52 P.3d 1158 (internal quotations omitted).

to represent Mr. Ford. (R. 303.) On March 2, 2007, Mr. Ford moved to have his current counsel substituted for SLDA (which had already withdrawn) or for Ms. Gowans and Mr. Spencer (who had not yet entered an appearance). (R. 305.) On March 12, 2007, Mr. Ford moved the district court to appoint his new counsel as paid counsel under the Indigent Defense Act ("IDA"), the Utah Constitution, and the United States Constitution. (R. 319.) On March 19, 2007, the district court entered an order approving the appointment of Mr. Ford's current counsel after the State had stipulated to the appointment, leaving only a dispute concerning whether the appointment should be pro bono or paid. (R. 339.)

Mr. Ford then notified Salt Lake County that he was seeking appointment of paid counsel by sending it courtesy copies of all the relevant pleadings. (R. 393.) In support of his motion, Mr. Ford filed affidavits demonstrating his continued indigency. (R. 340.) Mr. Ford explained in his affidavit that he had been working at Kimball Equipment Company in Salt Lake City since the time he was released from prison, but his $1,740 monthly income leaves only $208 in discretionary income each month, after taxes, living expenses, and child support for Mr. Ford's son are deducted. (R. 341, 416.) Mr. Ford then filed the affidavit of Tawni J. Anderson Sherman, who testified that defending against the State's appeal would cost between $15,000 and $45,000. (R. 389, 416.)

On May 31, 2007, the district court held a hearing on Mr. Ford's motion to appoint paid counsel. (R. 413). After the hearing, the district court granted Mr. Ford's motion and directed counsel for Mr. Ford to provide a copy of its order to the County. (R. 413.) The district court specifically found—based upon evidence in the written record and representations of Mr. Ford's counsel at the hearing—that the County had been notified

of the hearing, as required under the IDA. (R. 417.) The district court then ruled that Mr. Ford is entitled to paid counsel under the IDA, the Utah Constitution, and the United States Constitution. (R. 417-423.)

On June 28, 2007, the State appealed the district court's order appointing paid counsel. (R. 427.) This Court consolidated both of the State's appeals.

III. Statement of Facts

On August 19, 1993, the State charged Mr. Ford by information with possession of a dangerous weapon and aggravated assault. (R.144) Mr. Ford promptly invoked his constitutional right to a preliminary hearing, and on September 9, 1993, a circuit court commissioner, Frances Palacios, who was not a member of the judicial branch, bound Mr. Ford over for trial. (R.10.) Mr. Ford was acquitted on the assault charge, but was convicted on the weapon charge. (R. 52.) Mr. Ford served 13 years before being released in August 2006. (R. 284.)

SUMMARY OF ARGUMENT

In the first opening brief, filed before the remand, the State argues that Mr. Ford's jurisdictional claims were procedurally barred by the legislature when it enacted the PCRA. This is incorrect. This Court has inherent constitutional powers under article VIII, section 3 and the habeas corpus provision in article I, section 5, to consider the merits of a collateral attack on an original trial court's subject matter jurisdiction.[6]

On the merits, the State makes two concessions that demonstrate the original trial court lacked subject matter jurisdiction. First, the State concedes that an article I, section 13 preliminary hearing is a constitutional prerequisite for a trial court to obtain subject matter jurisdiction over a criminal matter. (First Br. at 22-23.) Second, the State concedes that the circuit court commissioner who presided over Mr. Ford's preliminary hearing was not a judicial officer. (First Br. at 17, 19, 21.) The State attempts to escape the conclusion that the original trial court lacked subject matter jurisdiction by asserting that a preliminary hearing need not be conducted by a member of the judicial branch. The State's assertion is incorrect.

The Magna Carta enshrined the requirement that before citizens can be forced to endure a felony trial, the prosecuting executive must show an independent judicial body—the grand jury—that probable cause exists to believe the crime was committed. In the late nineteenth century, states began experimenting with a substitute to the use of grand juries in felony cases by permitting the showing of probable cause to be made at a preliminary hearing before a judicial officer instead of a full grand jury. This right to

---

[6] Sullivan v. Turner, 22 Utah 2d 85, 87, 448 P.2d 907 (1968); Thompson v. Harris, 106 Utah 32, 40, 144 P.2d 761 (1943).

preliminary hearings made is way into article I, section 13 of the Utah Constitution, as did the requirement that such hearing be conducted by a member of the judiciary. Article I, section 13 uses the term "magistrate," a word defined as one with the authority to exercise judicial powers. State v. McIntrye, 92 Utah 177, 183; 66 P.3d 879, 882 (Utah 1937). Early case law establishes this definition, and no recent case law calls it into question. The State's assertion that any "lawyer with criminal law experience" may preside over a preliminary hearing is without historical support. Under the Utah Constitution, the hearing must be conducted by a member of the judiciary, something that did not happen in Mr. Ford's case. Therefore, the original trial court never obtained jurisdiction to try Mr. Ford.

Mr. Ford's preliminary hearing contained an additional constitutional defect—the legislature made an unconstitutional delegation of judicial powers to a non-judicial officer in authorizing, by statute, the commissioner to preside over Mr. Ford's preliminary hearing. The State contends that magistrates do not exercise judicial authority because they do not enter final judgments and that, even if did exercise judicial authority, the commissioner had de facto judicial authority when acting as a magistrate. Both arguments fail. First, magistrates do enter final judgments—when they dismiss an information—and therefore, under the State's criteria, they exercise judicial power. Second, under the de facto authority doctrine the first citizen to raise the separation of powers violation—in this case Mr. Ford—can benefit from the violation. Therefore, Mr. Ford is entitled to be released. The Court may affirm on this independent basis.

In the State's second opening brief, it argues that the trial court erred in ruling that Mr. Ford has a right to paid counsel under the Indigent Defense Act, the Utah

Constitution, and the United States Constitution. The State's argument is premised entirely upon the distinction between civil proceedings and criminal proceedings, and the assertion that post-conviction proceedings are civil. As Mr. Ford pointed out in the trial court, this distinction cannot carry the weight the State would place on it. The right to counsel sometimes does attach in "civil" proceedings, namely juvenile "criminal" cases, parental rights termination cases, and parole revocation hearings. And the right to counsel sometimes does not attach in "criminal" proceedings, namely where a defendant files a discretionary appeal after his sentence is affirmed in an appeal of right. The distinction relevant to the question of the entitlement to paid counsel that these cases reveal is whether the State is attempting to deprive a citizen of a fundamental right, such as liberty. When such a deprivation is the probable consequence of the State's proceeding against a party, the party is entitled to paid counsel.

This is reflected in Utah law recognizing there is a right to counsel for probation (and parole) revocation hearings, but no such right to counsel in parole grant hearings, where prisoners have already lost their liberty. It is also reflected in federal law recognizing the right to counsel to defend against a state's discretionary appeal after a defendant's successful appeal of right granting relief, but no right to counsel for a defendant to prosecute a discretionary appeal after an unsuccessful appeal of right. The key is whether the State is attempting to upset the legal status quo by obtaining the right to deprive a citizen of a fundamental liberty interest.

Here, the State is attempting to send Mr. Ford back to prison, where he already spent 13 years for a conviction for gun possession. Therefore, to defend against the State's appeal, Mr. Ford has the right to paid counsel.

ARGUMENT

Mr. Ford spent 13 years in prison[7] after being convicted of possessing a dangerous weapon, even though the State never complied with the constitutional prerequisite for filing the information—that the charge be submitted for "examination and commitment by a magistrate." Utah Const. art. I, § 13. Mr. Ford's preliminary hearing was instead conducted by a commissioner who had no judicial authority. As the State notes, if Mr. Ford was denied this constitutional right, then "the trial court lacked subject matter jurisdiction to try him under the existing precedent." (First Br. at 23.) In the first opening brief, the State makes two arguments to avoid this result: (i) the PCRA prevents the Court from considering the merits of Mr. Ford's petition and (ii) the language in article I, section 13 requiring examination and commitment by "a magistrate" does not refer to a member of the judicial branch. Both arguments fail.

First, this Court's review of Mr. Ford's petition derives not from the PCRA, but from its inherent constitutional powers under article VIIII, section 3, and the habeas corpus provision in article I, section 5. Utah law has always recognized that (i) the judiciary has constitutional authority to vacate a conviction and sentence in the interest of justice and (ii) the "interests of justice" includes circumstances in which the original trial court lacked subject matter jurisdiction. The passage of 13 years that Mr. Ford spent in prison only heightens the injustice; it does not, as the State argues, cure the violation under a legislatively created rule of procedure.

---

[7] In fact, if Mr. Ford's conviction is reinstated, his conviction would provide a basis for federal prosecution of a parole violation. Without the conviction, like the State, federal prosecutors would have to prove that Mr. Ford possessed a dangerous weapon.

Second, the history of article I, section 13 demonstrates that preliminary hearings must be conducted by a member of the independent judiciary, not anyone who happens to be a "lawyer with criminal law experience," as the State repeatedly suggests. (First Br. at 29.) As demonstrated below, Mr. Ford was denied his right to the preliminary hearing required by article I, section 13, a prerequisite to the executive branch having authority to prosecute and to the trial court obtaining subject matter jurisdiction. The district court was correct to vacate Mr. Ford's conviction and sentence.

Finally, after the district court vacated Mr. Ford's conviction and sentence and released him, the State decided that it wanted Mr. Ford to serve more than the 13 years he had already spent in prison for possession of a dangerous weapon, but it did not want to provide Mr. Ford a proper preliminary hearing and new trial. The State instead attempts to achieve the same legal result—gaining authority to deprive Mr. Ford of his liberty and send him back to prison—by filing this appeal. Had the State chose to re-try Mr. Ford, he undisputedly would have had the right to counsel. As demonstrated below, this right to counsel cannot be extinguished simply because the State has chosen to deprive Mr. Ford of the same liberty though the appellate courts instead of the trial court.

I. Mr. Ford's Claims Are Not Procedurally Barred; Therefore, the Court Should Address the Merits of Mr. Ford's Petition

In the first opening brief, the State assumes that the procedural bars described in the Post-Conviction Relief Act restrict this Court's authority to reach the merits of Mr. Ford's petition. As described below, this assumption is incorrect for two reasons. First, as the State now recognizes in its second opening brief: "The Utah Supreme Court has concluded that the judicial branch has state constitutional authority for post-

conviction review of a criminal conviction under Art I, § 5 and Art. VIII." (Second Br. at 30.) Therefore, this Court should review the petition pursuant to its constitutional authority, not the PCRA. Second, even ignoring the Court's constitutional powers, the State's procedural bar arguments under the PCRA do not apply to Mr. Ford's claims because Mr. Ford has good cause for failing to raise them previously. For both reasons, the Court should address the merits.

A. The Court Has Inherent Constitutional Authority to Review the Merits of Mr. Ford's Petition

The Court has the constitutional authority under article VII, section 3, and article I, section 5, to review the merits of Mr. Ford's petition. Article I, section 5 provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Const. Art. I, § 5. Neither statutes nor rules of procedure can diminish this Court's inherent constitutional authority, except where another constitutional provision expressly authorizes such interference, something absent here. Julian v. State, 966 P.2d 249, 253 (Utah 1998) ("the legislature may not impose restrictions which limit the writ as a judicial rule of procedure, except as provided in the constitution"); State v. Barrett, 2005 UT 88, ¶7 n.4, 127 P.3d 682 (recognizing that Rule 65B cannot "diminish the availability of extraordinary relief").

A statute, such as the PCRA, could not deprive the judicial branch of this constitutional authority. At the time Utah became a state, courts routinely reviewed criminal convictions in habeas petitions, especially when they involved jurisdictional challenges. This point is demonstrated by a case strikingly similar to this one decided by the United States Supreme Court in 1884. In Ex parte Wilson, the Court granted a habeas

petition where "a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged." 114 U.S. 417, 429 (1884) (emphasis added). In other words, constitutional checks on prosecutorial discretion are sufficiently important that the failure to comply with them not only precludes subject matter jurisdiction but also permits a court to vacate a beyond-a-reasonable-doubt verdict on habeas review.

Utah law is in accord. In 1875, the Supreme Court of the Territory of Utah released a prisoner on habeas corpus because the Justice of the Peace did not have jurisdiction to arrest. Ex parte Dixon, 1 Utah 192, 193 (1875). Jurisdiction was lacking because service of the summons was defective, which rendered the judgment "void." Id. After Utah became a state, the rule was no different. Winnovich v. Emery, 33 Utah 345, 361, 93 P. 988, 994 (1908) (recognizing that "on habeas corpus proceedings," if a court determines that "there was no preliminary examination or hearing by the magistrate, the accused should be discharged").

Here, Mr. Ford's petition claims that the original trial court lacked subject matter jurisdiction and therefore his conviction and sentence are "a nullity and void." (R. 5.) This places Mr. Ford's petition squarely within the historical scope of the Court's constitutional authority.[8] Areson v. Pincock, 220 P. 503, 504 (Utah 1923) ("Habeas

[8] The fact that the district court was led to construe the petition as falling under the PCRA and Rule 65C, instead of article I, section 5, is irrelevant. (R. 151.) Appellate courts are not bound by how a petition is characterized—either by the parties or a lower court—but

corpus takes cognizance only of defects of a jurisdictional character, which render the proceedings not merely voidable; but absolutely void."). As the Utah Supreme Court has explained, "a writ of habeas corpus was classically used to challenge the lawfulness of a physical restraint under which a person was held or the jurisdiction and sentence of a court that convicted a person," and provides "a post-conviction remedy in unusual circumstances to determine whether a person was convicted in violation of principles of fundamental fairness or whether the sentence imposed is void." Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 681-82 (Utah 1995) (emphasis added). Thus, this Court may adjudicate the merits of Mr. Ford's petition because it demonstrates that his original trial court "had no jurisdiction over the person or the offense." Brown v. Turner, 21 Utah 2d 96, 98, 440 P.2d 968 (1968); see also Thompson v. Harris, 106 Utah 32, 40, 144 P.2d 761 (1943).

The lack of jurisdiction precludes all procedural bars. As the Utah Supreme Court has explained, even where a jurisdictional claim could have and should have been raised previously, a conviction "can be subjected to collateral attack . . . when the interests of justice so demand because of some extraordinary circumstances or exigency: e.g., lack of jurisdiction." Sullivan v. Turner, 22 Utah 2d 85, 87, 448 P.2d 907 (1968) (emphasis added). The Court has recognized the constitutional authority to review post-conviction petitions extends even to cases in which there has been no showing of prejudice. Menzies v. Galetka, 2006 UT 81; ¶¶61, 62, 150 P.3d 480 (holding that relief under Rule 60(b) was appropriate despite statutory bars because a "post-conviction proceeding is a

---

look "to the substance of the action and the nature of the relief sought in determining the true nature of the extraordinary relief requested." Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 681 (Utah 1995).

proceeding of constitutional importance, over which the judiciary has supervisory responsibilities due to our constitutional role"). In short, this Court has the constitutional authority to review the merits of Mr. Ford's petition.[9]

B. The State's Procedural Bar Argument Fails Because Judge Medley Did Not Construe the Third Petition As Raising a Jurisdictional Claim

The State's procedural bar argument under the PCRA fails for another reason. The State's primary procedural argument is that Mr. Ford's claims in his current petition are barred because they were raised in Mr. Ford's earlier third petition. This is not so.

As the district court recognized, in adjudicating the third petition (on procedural grounds) Judge Medley expressly construed the pro se petition as not raising a jurisdictional challenge: "Petitioner's challenge to the court commissioner's authority to preside at his preliminary hearing does not state a challenge to the Court's jurisdiction to try petitioner." (R. 54-55, 151 (emphasis added).) The State's briefs in the district court confirm this. When addressing the merits of the current petition, the State characterized Judge Medley's previous order as follows: the third petition's "challenge to the court commissioner's authority to preside at his preliminary hearing did not state a challenge to the court's jurisdiction to try petitioner; therefore, the claim was procedurally barred." (R. 45.) According to the State, only in "subsequent pleadings"—meaning the petition at

---

[9] In its first brief, the State repeatedly cites State v. Robison, 2006 UT 65, 147 P.3d 448, for the proposition that the district court should not have relied on its own reasoning in resolving the petition. Robison does not mention a district court's authority to reason its way to a just conclusion, but instead only cautions appellate courts reviewing district court decisions not to reverse on alternative grounds which have not been briefed by the parties. Importantly, the court states, "other than for jurisdictional reasons the court of appeals should not normally search the record for unargued and unbriefed reasons to reverse a district court judgment." Id. at ¶22 (emphasis added) (internal quotations omitted).

issue in this appeal—did Mr. Ford claim that "the alleged defect is jurisdictional." (R. 47.)

Even assuming Judge Medley had considered Mr. Ford's third petition as raising a jurisdictional challenge, the challenge stemmed from an unconstitutional delegation, not a violation of article I, section 13. In the district court, the State recognized both (i) that the third petition presented only an argument concerning "an unconstitutional delegation of judicial authority" and (ii) that Mr. Ford's current article I, section 13 claim was not raised in the third petition: Mr. "Ford did not include his present claim in this third petition." (R. 45, 107.)

The State also argued below that the issue concerning whether "the commissioner lacked authority to preside at his preliminary hearing because allowing her to do so was an unconstitutional delegation of a core judicial function" had been raised by Mr. Ford "[f]or the first time in his Opposition Memorandum." (R. 130 (emphasis added).) The State went so far as to argue that Mr. Ford had to "amend his petition" before the district court could consider the unconstitutional delegation claim. (R. 130.) If the unconstitutional delegation claim was raised for the first time in the opposition memorandum, then it could not be identical to any of the claims originally raised in the petition, including the article I, section 13 claim. Importantly, it is not the article I, section 13 claim, but what the State construed as the "newly raised" unconstitutional delegation claim, that the State asserts is "the identical claim that Ford litigated and lost in his third petition." (R. 130 & n. 3.)

Mr. Ford disputes that Judge Medley adjudicated any jurisdictional claims. However, insofar as this Court concludes that Judge Medley did implicitly address a

jurisdictional challenge when he ruled the petition was procedurally barred, and that, this Court then implicitly ruled on the same issue, these conclusions would have the potential to affect only Mr. Ford's unconstitutional delegation claim, not his article I, section 13 claim, and not to preclude addressing the merits of the claim: "Protection of life and liberty from unconstitutional procedures is of greater importance than is res judicata."[10] Hurst v. Cook, 777 P.2d 1029, 1035, 1036 (Utah 1989) ("a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted . . . in harmony with constitution standards").

Utah's common law exceptions to procedural bars survive enactment of the PCRA. Gardner v. Galetka, 2007 UT 3, ¶21, 151 P.3d 968. Under the common law, courts could reach the merits of successive petitions otherwise procedurally barred upon a showing of good cause. Candelario v. Cook, 789 P.2d 710, 712 (Utah 1990) (providing a non-exhaustive list of what constitutes good cause or unusual circumstances). And good cause exists here because (as demonstrated in section III of this brief), after Mr. Ford's third petition was dismissed as procedurally barred, the Utah Supreme Court clarified the scope of the doctrine of unconstitutional delegation in Jones v. Utah Bd. of Pardons & Parole, 2004 UT 53, 94 P.3d 283, a clarification that now makes clear that the

[10] The State argues that "Ford was not entitled to raise the jurisdictional challenge in successive petitions until he found a post-conviction court that agreed with him. (First Br. at 11.) In fact, this is precisely what the writ of habeas corpus entitles a prisoner to do: "By the common law of England it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of habeas corpus, and each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of coordinate jurisdiction, even if the grounds urged are exactly the same." Hurst v. Cook, 777 P.2d 1029, 1035 n.4 (Utah 1989) (quoting Eshugbayi Eleko v. Nigeria [1928] AC (Eng) 459- PC. Rex v. Gee Dew (1924) 33 BC 524, [1924] 3 DLR 153.)

legislature's delegation of judicial power to court commissioners violates article V, section 1 and article VIII, section 1 of the Utah Constitution. Thus, the "ends of justice would be served" by addressing the merits here. Hurst, 777 P.2d at 1037.

Mr. Ford could not have anticipated the court's clarification of this doctrine when he filed his pro se third petition, and it would be fundamentally unfair to preclude review of the merits of any of his claims, all of which raise serious constitutional violations that deserve resolution on the merits. As the Utah Supreme Court recently recognized, "no statute of limitations may be constitutionally applied to bar a habeas petition," as "proper consideration of meritorious claims raised in a habeas petition will always be in the interests of justice." Frausto v. State, 966 P.2d 849, 851 (Utah 1998). The Court should address the merits.

II. Mr. Ford Was Denied His Right to Preliminary Hearing Under Article I, Section 13, and Therefore, the Original Trial Court Never Obtained Subject Matter Jurisdiction to Try Mr. Ford for Possession of a Dangerous Weapon

Under article I, section 13 of the Utah Constitution, Mr. Ford was entitled to a preliminary hearing before a "magistrate." The Utah Supreme Court has explained that the Utah Constitution does not provide prosecutors unfettered discretion. The court has noted that "courts have had occasion to scrutinize the exercise of the broad discretion accorded prosecutors, and that scrutiny has revealed that the prosecutor's good faith is a fragile protection for the accused." State v. Brickey, 714 P.2d 644, 647 (Utah 1986). A preliminary hearing by a magistrate provides a check on such abuses.

As the original definition of the word "magistrate" demonstrates, a preliminary hearing must be conducted by a member of the judicial branch, something the State concedes did not occur in Mr. Ford's case. Therefore, the prosecutor did not have the

authority to bring Mr. Ford to trial and the original trial court did not have subject matter jurisdiction to try Mr. Ford. As the district court has correctly concluded, Mr. Ford's conviction and sentence are void.

In the first opening brief, the State does not deny either that a preliminary hearing is a jurisdictional prerequisite for a trial court obtaining subject matter jurisdiction or that Mr. Ford's preliminary hearing was not conducted by a member of the judicial branch. Instead, the State argues that the article I, section 13 right to preliminary hearing by "magistrate" does not require a preliminary hearing by a member of the judicial branch. The historical context in which article I, section 13 was enacted and interpreted by early courts demonstrates otherwise.

A. The Origins of the Preliminary Hearing and Its Historical Significance as a Check on Prosecutorial Discretion

The right to a preliminary hearing is a "substantial" right, deeply-rooted in the Anglo-American system of jurisprudence. State v. Pay, 45 Utah 411, 422, 146 P.300, 305 (Utah 1915). In response to executive branch abuses, the Magna Carta enshrined the requirement that before citizens can be forced to endure a felony trial, the prosecuting executive must show an independent judicial body—the grand jury—that probable cause exists to believe the crime was committed.[11] Hurtado v. California, 110 U.S. 516, 521 (1884); William Blackstone, 4 Commentaries at 305.

[11] The right to indictment by grand jury has always been a substantial right. As Blackstone explained, while a grand jury only finds "whether there be sufficient cause to call upon the party to answer [the King's charge, a] grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes." William Blackstone, 4 Commentaries at 300.

While misdemeanors could be prosecuted by information, even this practice was abused by the Crown. As William Blackstone explained, prosecutions by information "subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the [Glorious R]evolution, occasioned a struggle," a struggle that resulted in prosecution by information being curtailed. William Blackstone, 4 Commentaries, 307, 305. To stop the abuses, a new law required "that the clerk of the crown shall not file any information without express direction from the court of the king's bench." Id. (emphasis added). As the Utah Supreme Court has recognized, in England preliminary examinations of misdemeanor charges were held before a Justice of the Peace to permit a judicial determination that a trial is warranted. Utah v. Anderson, 612 P.2d 778, 784 n.20 (Utah 1980).[12]

In the late nineteenth century, states began experimenting with a substitute to the use of grand juries in felony cases by permitting the showing of probable cause to be made at a preliminary hearing before a judicial officer instead of a full grand jury. In 1884, the United States Supreme Court held that preliminary hearings before a judicial officer provided adequate due process under the Fourteenth Amendment, and for that reason refused to incorporate against the states the Fifth Amendment grand jury requirement. Hurtado v. California, 110 U.S. 516, 521 (1884).

After Hurtado, a number of state courts also determined that a right to preliminary hearing was an adequate substitute for the right to grand jury, but did so while expressly recognizing that the hearing must be conducted by a member of the judicial branch. For

[12] F. Maitland, Justice and Police 129 (1885) (The "preliminary examination of accused persons had gradually assumed a very judicial form."). Numerous other sources have also noted the historical importance of the preliminary hearing.

example, in 1891 the Colorado Supreme Court concluded that a preliminary hearing is an adequate "check upon hasty, ill-advised and malicious criminal prosecutions" because the examination process was "well understood" to be "a proceeding before a regularly constituted court or judicial magistrate in which the accused has the right to be present and hear all the witnesses, participate in their examination, and be heard also in his own behalf." In re Dolph, 17 Colo. 35, 28 P. 470, 471 (1891) (emphasis added).

The Wyoming Supreme Court reached the same conclusion after similarly noting that a preliminary examination includes, among other things, "an investigation by a judicial officer, a justice of the peace, of the accusation, where the accused may face his accusers and have an opportunity to establish his defense." In re Boulter, 5 Wyo. 329, 40 P. 520, 522 (1895) (emphasis added). These cases confirm that at the time Utah became a state the requirement that preliminary hearings be conducted by a member of the independent judiciary—as a check on otherwise unfettered prosecutorial discretion—remained a substantive part of the right to preliminary hearing.

B. Utah Law Requires that the Preliminary Hearing Be Conducted By a Magistrate, a Member of the Judicial Branch of Government

A year after Boulter, the right to preliminary hearing made its way into article I, section 13 of the Utah Constitution, as did the requirement that such hearings be conducted by a member of the judiciary, a magistrate. Specifically, article 1, section 13 provides: "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment." Utah Const. art. I, § 13.

Although the word "magistrate" is not defined in the Utah Constitution, Utah courts have recognized that the word "had a very definite and concrete meaning" at the time of statehood. State v. McIntrye, 92 Utah 177, 183; 66 P.3d 879, 881 (Utah 1937). A "magistrate" was defined as "an officer having power to issue a warrant for the arrest of a person charged with a public offense."[13] Id. (citing Comp. Laws Utah 1917 § 8677; Rev. Stat. Utah § 105-10-4 (1933)) see also Rev. Stat. Utah § 4607 (1898). Early statutes defined "magistrate" as including (i) justices of the supreme court; (ii) judges of the district courts; and (iii) justices of the peace.[14] Rev. Stat. Utah § 4608 (1898); Comp. Laws Utah 1917, § 8678. In short, at the time article I, section 13 was enacted, it was well understood that "the conducting of preliminary hearings . . . , by a court or magistrate, is the exercise of judicial power." State v. Shockley, 80 P. 865, 876 (Utah 1905) (Bartch, C.J., concurring) (emphasis added).

The State suggests that the Utah Supreme Court recently ignored this history and recognized (in dicta) that a magistrate conducting a preliminary hearing could include someone not a member of the judiciary. (First Br. at 16-17.) The State cites State v. Humphrey, in which the court addressed the question of whether a criminal defendant may appeal a defect in a preliminary hearing without first seeking review from the trial court. 823 P.2d 464, 465-8 (Utah 1991). Under the statutes at the time, the question

---

[13] As the Utah Supreme Court recently recognized, even the issuance of a search warrant is a "core judicial function," a phrase used in separation of powers analysis but nonetheless corroborative of the fact that preliminary hearings must be conducted by judicial officers. State v. Thomas, 961 P.2d 299, 304 (Utah 1998). Also corroborative is the fact that the probable cause standard is identical for an arrest warrant and for a bindover order. State v. Virgin, 2006 UT 29, ¶18, 137 P.3d 787.

[14] Later, in 1933, judges of the old city courts were added as permissible magistrates. Rev. Stat. Utah § 105-10-5 (1933). These judges also were members of the judiciary.

hinged upon whether the magistrate in a preliminary hearing was a "court of record," because, if it had been a court of record, then a direct appeal from its bindover order would have been permitted. Id. at 468. The distinct question of whether magistrates must be members of the judicial branch was not before the court, as demonstrated by the court's actual holding: "Because magistrates are not courts of record when they conduct preliminary hearings and issue bindover orders, under the current jurisdictional statutes their orders are not immediately appealable." Id.

The State asserts that Humphrey stands for the proposition that "a judge serving as a magistrate at a preliminary hearing is not exercising his judicial authority." (First Br. at 17.) The language the State quotes from Humphrey in support of its assertion makes an entirely different point: "judges, 'when sitting as magistrates have the jurisdiction and powers conferred by law upon magistrates and not those that pertain to their respective judicial offices.'" (First Br. at 17 (quoting Humphrey, 823 P.2d at 467).) The quoted language merely states that judges serving as magistrates do not carry all aspects of "their respective judicial offices" to the task of conducting a preliminary hearing. It does not say that magistrates need not be judicial officers.[15]

Nor could it, as the Utah Supreme Court also recognizes that magistrates enter final, appealable judgments after a preliminary hearing when they dismiss an information

[15] This is confirmed by the case from which the language the State quotes in Humphreys originated, Van Dam v. Morris, 571 P.2d 1325, 1327 (Utah 1977). Morris, much like Humphrey, held that a "city judge, acting not as a city judge with jurisdiction over the offense, but as a magistrate, . . . did not have the power to dismiss the accusatory pleading brought before him for the purpose of preliminary examination." Id. Again, this has nothing to do with whether the person conducting preliminary hearing must be a member of the judicial branch. If it did, however, Morris recognized that the "office of magistrate" is conferred upon individuals "who exercise judicial powers." Id.

for lack of probable cause. State v. Jaeger, 886 P.2d 53, 54-55 (Utah 1994). In the first opening brief, the State defines judicial authority as the authority to enter final judgments, something magistrates do under Jaeger. (First Br. at 17-18.) Therefore, under the State's own logic, magistrates in preliminary hearings are exercising judicial authority. While Humphery did not address the question of whether someone not a member of the judiciary may conduct preliminary hearings, Jaeger confirms that the answer is "no."

The State also argues that the commissioner presiding over Mr. Ford's preliminary hearing had authority to do so under Utah Code section 77-1-3 (1993), which defined "magistrate" to include court commissioners. (First Br. at 19.) Plainly, a statute cannot alter the content of article I, section 13. Nor does the State suggest it could. Instead, the State recognizes that its statutory argument depends entirely upon its assertion that "[m]agistrates presiding at preliminary hearings are not exercising 'judicial authority.'" (First Br. at 21.) For reasons set forth previously, this assertion is incorrect. In the end, the State's argument demonstrates that commissioners could not exercise "judicial authority" because such authority had not been "expressly provided to them by the Judicial Council," a prerequisite to anyone exercising judicial powers. (First Br. at 21.)

The State's final argument is that "the identity of the person officiating at a hearing is not integral to the court's jurisdiction." (First Br. at 8.) The State explains that the particular commissioner who conducted Mr. Ford's preliminary hearing had adequate qualifications because "only lawyers with criminal law experience could serve as commissioners determining whether there was probable cause." (First Br. at 22, 29.) This argument demonstrates the problem with adopting criteria other than the long-

standing requirement that a member of the judiciary must preside over preliminary hearings. The State's suggested alternative criteria of any lawyer with criminal law experience—which would include every prosecutor,[16] even the Attorney General—has been rejected by the United States Supreme Court in similar circumstances.

In Coolidge v. New Hampshire 403 U.S. 443, 450 (1971), New Hampshire had authorized its Attorney General to make a constitutionally required probable cause determination; in this case, for a search warrant. New Hampshire argued that (i) its Attorney General, who had been authorized as a "justice of the peace to issue warrants under then-existing state law, did in fact act as a 'neutral and detached magistrate'" and (ii) any error was harmless because there was undisputedly probable cause to issue the warrant. Id. at 450. The court rejected both arguments. The court first rejected the contention that the Attorney General had been authorized to issue warrants and had acted impartially, holding that "there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all the circumstances." Id. The Court then rejected the harmless error argument, holding that even though there was probable cause, "[s]ince he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." Id. at 453.

Similarly, there is no reason for this Court to recognize anything other than the per se rule that only members of the judiciary may conduct preliminary hearings under article I, section 13, a requirement that has been recognized since Utah became a state. Because

[16] Presumably, a prosecutor has already determined there is probable cause before filing charges, so without additional criteria—such as membership in the judicial branch of government—would render the right to preliminary hearing a nullity.

the commissioner who conducted Mr. Ford's preliminary hearing was not a member of the judicial branch, Mr. Ford was denied the preliminary hearing guaranteed under article I, section 13.

C. A Magistrate Must Bind Over a Defendant on Each Charge Before a District Court May Obtain Subject Matter Jurisdiction

Mr. Ford was convicted of possession of a dangerous weapon, a charge that was never presented to a magistrate. Therefore, the prosecutor never obtained the authority to prosecute, and the original trial court never obtained subject matter jurisdiction to try, Mr. Ford on that charge. The State concedes that "a preliminary hearing and bindover are 'essential to a court's jurisdiction over a felony,' and that a district court may 'try a defendant [only] on the specific charge that is bound over.'" (First Br. at 22 (citation omitted) (alteration in original).) While the State maintains that it may dispute that an article I, section 13 hearing is a jurisdictional prerequisite "in future cases," it candidly admits that it may not do so in this case because it did not raise the argument below. (First Br. at 23 n. 8.)

The existing precedent demonstrates not only that the failure of the prosecutor to present the possession charge to "examination and commitment by a magistrate" precluded the original trial court from obtaining subject matter jurisdiction, but also that the failure to provide an article I, section 13 hearing may be raised at any time. Under Utah law, where a charge is not first presented to a magistrate, the trial court lacks subject matter jurisdiction to try a defendant, even if there is ample evidence to support the charge. State v. Nelson, 52 Utah 617, 176 P. 860, 863 (1918) ("Where a complaint before an examining magistrate charges a certain offense, the defendant cannot be held to

answer for any other not involved within it, notwithstanding the evidence before the magistrate may establish another offense."); see also State v. Jensen, 34 Utah 166, 96 P. 1085, 1087 (1908) (holding defendant could not be tried for offense distinct from the one upon which he had preliminary hearing).

Because identity of the person who may determine probable cause is a substantial part of the right to a preliminary hearing, presentment to the wrong entity precludes jurisdiction. In 1899, the Utah Supreme Court held that presentment to a magistrate under article I, section 13 could not substitute for presentment to a grand jury, where the alleged crime was committed before Utah became a state and therefore before article I, section 13. State v. Rock, 57 P. 532, 532 (1899). Even though the Utah Constitution then recognized that felony charges could be presented to a magistrate and even though there was no suggestion that the State had not demonstrated probable cause, the Utah Supreme Court held that "the prosecuting attorney had no authority to file the information."[17] Id. at 45. As here, the State did not have the authority "to take from the accused a constitutional right which belonged to him when the offense was committed."[18] Id.

After Utah became a state, it became equally essential that the charge be presented to "a magistrate having jurisdiction to investigate the charge and determine if there is probable cause," which, as demonstrated above, requires that the preliminary hearing be

---

[17] In contrast, when the wrong judicial officer presides over a preliminary hearing, the defect is not jurisdictional, as the right to preliminary hearing by magistrate is fulfilled. State v. Stilling, 770 P.2d 137, 142 (Utah 1989) (bindover by magistrate in wrong county not jurisdictional).

[18] This case is of particular note because the magistrate had de facto authority to conduct the preliminary hearing, something the State repeatedly asserts is sufficient to cure any jurisdictional defect in this case, an assertion discussed in Part III. (First Br. at 24-27.)

conducted by a member of the judiciary. State v. Freeman, 71 P.2d 196, 199 (Utah 1937) (emphasis added). The Court was correct when it recently recognized that "Utah has long recognized that a preliminary hearing is essential to a court's jurisdiction over a felony," as a "district court has jurisdiction only to try a defendant on the specific charge that is bound over." State v. Marshall, 2005 UT App 269, *1-2, 2005 Utah App. LEXIS 260; see also Utah R. Crim. P. 5(a) & 7(i)(2) (requiring felony information to be filed before a magistrate before a bindover may be issued and jurisdiction acquired by district court). Therefore, under settled Utah law, unless a charge is first presented for "examination and commitment by a magistrate," a prosecutor lacks authority to file an information containing that charge and the district court lacks subject matter jurisdiction to try the accused of that charge.

An accused can only waive the right to challenge the State's failure to present each charge to a magistrate by expressly waiving the right to preliminary hearing. Article I, section 13 provides that "the examination be waived by the accused with the consent of the State." Utah Const. art. I, § 13. Unsurprisingly, the Utah Supreme Court had held that once a defendant expressly waives the right to preliminary hearing, he cannot then complain that the charges against him were not first presented to a magistrate. State v. Freeman, 71 P.2d 196 (Utah 1937); United States v. Eldregde, 13 P. 673, 676 (Utah 1887). Absent an express waiver of the right to preliminary hearing, however, the failure to present a charge to a magistrate is jurisdictional and therefore not waivable.[19] In this case, it is undisputed that Mr. Ford did not waive his right to preliminary hearing.

[19] A possible exception is when a defendant pleads guilty to the crime. Rule 10(c) of the Utah Rules of Criminal Procedure provides that: "Any defect or irregularity in or want or absence of any proceeding provided for by statute or these rules prior to arraignment shall

A number of non-jurisdictional defects in a preliminary hearing may be implicitly waived if not raised at the time the defendant enters an initial plea. Examples include (i) the accused does not have counsel,[20] (ii) the accused is not permitted to confront witnesses,[21] or (iii) the evidence does not support probable cause.[22] However, Mr. Ford does not allege any of these defects here.

Where a defendant does not waive his right to have each charge against him first presented to a magistrate, and yet the State fails to do so, the trial court cannot obtain subject matter jurisdiction to try the defendant, and therefore, any beyond-a-reasonable-doubt conviction must be vacated. State v. Ortega, 751 P.2d 1138, 1141 (Utah 1988) (reversing conviction when defendant was convicted of criminal episode for which he had not been bound over); State v. Pettit, 93 P.2d 675, 677 (Utah 1939) (same); State v. Nelson, 176 P. 860 (Utah 1918) (same).

The failure to provide "examination and commitment by magistrate" for each charge cannot be waived, as it can be raised for the first time on appeal, State v. Hoben, 102 P. 1000 (Utah 1909), and can be raised in a habeas petition. Winnovich v. Emery, 93 P. 988, 994 (Utah 1908). As the court explained in Emery, "on habeas corpus proceedings," if a court determines that "there was no preliminary examination or hearing

---

be specifically and expressly objected to before a plea of guilty is entered or the same is waived." However, even this principal is unclear when a challenge involves a trial court's jurisdiction. State v. Rhinehart, 2007 UT 61, ¶15, 167 P.3d 1046 (guilty plea waives right to challenge all "nonjurisdictional" defects in the preliminary hearing).

[20] Crouch v. State, 467 P.2d 43, 44 (Utah 1970) (voluntary waiver of counsel at preliminary hearing cannot be grounds for setting aside a conviction on appeal).

[21] Rhinehart, 2007 UT 61 at ¶¶18-19 (preliminary hearing valid despite defendant's inability to confront witnesses);

[22] State v. Quas, 837 P.2d 565 (Utah Ct. App. 1992) (citing cases that concern evidentiary defects).

by the magistrate, the accused should be discharged." Id. The court recognized that such a jurisdictional defect exists unless the "magistrate had jurisdiction of the subject-matter and of the person of the accused." Id.

This rule under article I, section 13 is consistent with the general principal that a lack of subject matter jurisdiction may be raised at any time. The court recently explained that "when subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void." Barton v. Barton, 2001 UT App 199, ¶12, 29 P.3d 13; see also Peterson v. Utah Bd. Of Pardons, 907 P.2d 1148, 1151 (Utah 1995) ("subject matter jurisdiction is an issue that can and should be addressed sua sponte when jurisdiction is questionable").[23]

Because Mr. Ford did not waive his right to preliminary hearing by magistrate and a magistrate did not "examine" the possession of a dangerous weapon charge, the prosecutor never obtained the authority to file an information in the original trial court, and the original trial court never obtained subject matter jurisdiction to try Mr. Ford. Because the original trial court lacked jurisdiction, the district court in this case correctly vacated Mr. Ford's sentence. This Court should affirm.

III. The Commissioner's Exercise of the Authority to Conduct Mr. Ford's Preliminary Hearing Resulted From an Unconstitutional Delegation of a Core Judicial Function

Mr. Ford's petition raises an independent basis to affirm the district court's order vacating his conviction and sentence. Specifically, Mr. Ford argues that the legislature

[23] At times, the State suggests that this principle applies only when reviewing the jurisdiction of the presiding court. (First Br. at 13.) This cannot be correct. As explained previously, the traditional use of habeas petitions was to challenge an original trial court's jurisdiction in a separate proceeding.

unconstitutionally delegated to a commissioner the judicial authority to conduct preliminary hearings, a violation of article V, section 1 and article VIII, section 1. As the State recognizes in its first opening brief, the legislature authorized commissioners to conduct preliminary hearings, but the Judicial Council did not. (First Br. at 20-21.) The State argues that this does not constitute an unconstitutional delegation because (i) conducting a preliminary hearing is not a core judicial function and only core judicial functions cannot be delegated to non-judicial officers; and (ii) the commissioner presiding over Mr. Ford's hearing had de facto judicial authority, and therefore, her actions did not strip the original trial court of subject matter jurisdiction. (First Br. at 24-27.)

Both arguments fail. Under current case law discussing unconstitutional delegation doctrine, conducting a preliminary hearing is a core judicial function because (i) a magistrate's decision to bindover an accused is immediately enforceable and (ii) a magistrate's refusal to bindover constitutes a final judgment. In addition, assuming the commissioner conducting Mr. Ford's preliminary hearing was exercising de facto judicial authority, the doctrine does not apply to preclude affording relief to Mr. Ford. Instead, non-delegation cases provide that the first citizen to raise a particular unconstitutional delegation claim—in this case, Mr. Ford—may benefit from having raised it regardless of whether there was de facto authority. In other words, the doctrine of de facto authority does not affect Mr. Ford's petition.

A. Conducting a Preliminary Hearing is a Core Judicial Function That Commissioners Lack Authority to Perform

For the reasons discussed previously in Section II, a person conducting a preliminary hearing under article I, section 13 must be a member of the independent judiciary. Under the non-delegation doctrine, conducting a preliminary hearing is also a core judicial function.

The Utah Supreme Court explained what constitute core judicial functions in Salt Lake City v. Ohms, 881 P.2d 844 (Utah 1994). In Ohms, the court held that a court commissioner lacks the required judicial authority in misdemeanor cases to enter a final judgment of conviction and impose sentence, something the court described as a "core judicial function." Id. at 851. The court therefore vacated the conviction and sentence because the delegation of judicial power was unconstitutional. Id. at 855.

The Ohms court explained that core judicial functions include (i) "the power to hear and determine controversies between adverse parties and questions in litigation," (ii) "the authority to hear and determine justiciable controversies," (iii) "the authority to enforce any valid judgment, decree or order," and (iv) "all powers that are necessary to protect the fundamental integrity of the judicial branch." Id. at 849. In contrast, core judicial functions do not include functions that are generally designed merely to "assist" courts, "such as conducting fact finding hearings, holding pretrial conferences, and making recommendations to judges." Id. at 851 n.17. The Ohms court held that because commissioners then-presiding over misdemeanor trials entered final judgments, they were exercising a core judicial function.

Four years later, the Utah Supreme Court explained the doctrine further in State v. Thomas, 961 P.2d 299 (Utah 1998). In Thomas, the court held that issuing a search

warrant is also a core judicial function that commissioners may not perform. The court based its holding on the following considerations. First, a search warrant is an enforceable order. Id. at 303. Second, a search warrant relates to one of "the most fundamental and cherished rights we possess," namely to be free from unreasonable search as seizures. Id. at 303. Third, in issuing a search warrant a commissioner "did not recommend to the judge that the warrant be issued but rather issued it herself." Id. at 304. Fourth, the issuance of a search warrant is not reviewable by a judge. Id. Finally, "while issuing a search warrant does not rise to the level of finality as entering judgment and imposing sentence, as was disallowed in Ohms, it is sufficiently final to establish it as a core judicial function." Id.

The same five considerations apply to orders issued by magistrates in preliminary hearings. First, a bindover order is immediately enforceable, as no further judicial determination is necessary to bindover the accused. And when a magistrate refuses to bindover, the State is precluded from proceeding to trial, or even from re-presenting the same charges unless new evidence emerges. State v. Brickey, 714 P.2d 644, 645 (Utah 1986). A magistrate's orders, like search warrants, are immediately enforceable.

Second, a bindover order also relates to one of our most cherished rights. The right to a preliminary hearing in article I, section 13 substitutes for the ancient right to indictment by grand jury, and affords citizens protection against "the 'substantial degradation and expense' attendant to a criminal trial." Id. at 646. The judicial check on prosecutorial discretion is at least as cherished as the judicial check on the authority of the executive branch to search citizens' homes.

Third, a bindover order is not a mere recommendation. The magistrate enters the bindover order, and the accused is boundover. The magistrate does not recommend to the district court that it enter the bindover order.

Fourth, while a bindover order—like the validity of a search warrant—is later reviewable by a trial court, the court does not review the bindover order de novo, as it would an order issued in a small claims court or justice court. Because bindover orders involve a "magistrate's factual findings," they "require some deference by a reviewing court." State v. Wodskow, 896 P.2d 29, 31 (Utah Ct. App. 1995). The same deference to bindover orders is afforded by appellate courts. State v. Virgin, 2006 UT 29, ¶26, 137 P.3d 787 ("in reviewing a magistrate's bindover decision, an appellate court should afford the decision limited deference").

Finally, magistrates conducting preliminary hearings enter final orders, not just "sufficiently final" orders, as the Thomas court described search warrants. The Utah Supreme Court has held that when a magistrate refuses to bindover an accused and instead dismisses the information, the magistrate's order—unlike a search warrant—is final and appealable. State v. Jaeger, 886 P.2d 53, 54 (Utah 1994). Therefore, a commissioner conducting a preliminary hearing does enter final judgments, which is certainly "sufficiently final to establish it as a core judicial function." Thomas, 961 P.2d at 304. Under the rule announced in Thomas, conducting a preliminary hearing is a core judicial function that a non-judicial officer, such as a commissioner, may not perform.

This result was confirmed by Jones v. Bd. of Pardons & Parole, 2004 UT 53, 94 P.3d 283, in which the Utah Supreme Court held that when the Board of Pardons issues "retaking warrants," which are similar to arrest warrants, it does not exercise a core

judicial function. The court explained that "Board members, unlike commissioners, do not serve in 'courts of record,' a characteristic that defined the realm of both Ohms and Thomas." Id. at ¶16. Later, the court reiterated that unlike the Board, justice court judges, and judges pro tempore, "commissioners are assigned to courts of record and are therefore ineligible to perform 'core judicial functions' under Ohms and Thomas." Id. at ¶17 n.1. After Jones, then, what makes commissioners ineligible to perform core judicial functions is that they serve in courts of record.

When commissioners act as magistrates in presiding over preliminary hearings, they also are serving in courts of record. The State cites State v. Humphery, 823 P.2d 464 (Utah 1991) for the proposition that bindover orders are not immediately appealable, and therefore, magistrates presiding over preliminary hearings are not serving on courts of record. (First Br. at 17.) While this is a possible interpretation of Humphery, this interpretation has been rejected by the Utah Supreme Court. Three years after Humphery in State v. Jaeger, the court held that while a magistrate's bindover order is not final and immediately appealable, when a magistrate declines to bindover and enters an order dismissing the information, that order is "a final judgment of dismissal" and "a final adjudicative decision." 886 P.2d 53, 55 (Utah 1994). The court therefore recognized in Jaeger that magistrates presiding over preliminary hearings do enter final judgments, which makes them courts of record under the definition in Jones.[24] If a magistrate serves

[24] In Jaeger, the court discusses the concept of a judge wearing two hats, one for his "judicial" functions and one for his "nonadjudicative" functions. 886 P.2d at 54 n.2. This distinction makes some sense when discussing the right to an immediate appeal because there is nothing inconsistent with allowing an immediate appeal from the refusal to bindover, but not allowing one from the decision to bindover. However, this distinction cannot work similarly in the non-delegation setting. If a magistrate must

on a court of record when he issues search warrants then he also serves on a court of record when he declines to bindover an accused for trial.

Presiding over a preliminary hearing is a core judicial function that commissioners may not perform under the criteria set forth in Thomas and the court-of-record requirement set forth in Jones. Because presiding over a preliminary hearing is a core judicial function, a court commissioner could not perform that function unless she could exercise judicial authority, authority the State recognizes court commissioners lacked. Therefore, when the legislature delegated the authority to serve as magistrates to commissioners, the delegation was unconstitutional under article V, section 1 and article VII, section 1 of the Utah Constitution.

B. A Commissioner Conducting a Preliminary Hearing Also Violates Separation of Powers

Even if conducting a preliminary hearing were not a core judicial function, having a non-judicial officer conduct a preliminary hearing would still violate the Utah Constitution. The Utah Supreme Court uses a separate analytical model to determine whether a legislative grant of judicial power violates the separation of powers, even where no core judicial function is involved. A violation occurs where (i) the actors are "charged with the exercise of powers properly belonging to one of the [other] branches;" (ii) "the function . . . appertain[s] to another branch of government;" and (iii) the constitution does not expressly permit the delegation. In re Young, 1999 UT 6, ¶8, 976 P.2d 581.

---

exercise any judicial authority in a preliminary hearing, then only one with judicial authority can serve as a magistrate.

All three criteria are satisfied here. First, commissioners do exercise powers properly belonging to the judiciary, such as determining whether there is probable cause to bindover and entering final judgments by dismissing informations.

Second, determining probable cause and dismissing informations appertain to the judicial branch. As explained above, article I, section 13 requires that judicial magistrates conduct preliminary hearings. The best evidence of this is that "magistrate" was originally defined as "an officer having power to issue a warrant for the arrest of a person charged with a public offense," a core judicial function. State v. McIntrye, 92 Utah 177, 183; 66 P.3d 879, 881 (Utah 1937) (citing Comp. Laws Utah 1917 § 8677; Rev. Stat. Utah § 105-10-4 (1933)) see also Rev. Stat. Utah § 4607. Article I, section 13 requires that a preliminary hearing be conducted by a magistrate, and a magistrate is a judicial officer.

Third, no constitutional provision expressly permits anyone other than a member of the judiciary to perform these functions. Therefore, when the commissioner presided over Mr. Ford's preliminary hearing, it also violated separation of powers, regardless of whether conducting a preliminary hearing is a core judicial function (which it is).

C. Even if the Commissioner Had De Facto Authority, Mr. Ford's Conviction Nonetheless Should Have Been Vacated

The State argues that even if the commissioner had no authority to preside over Mr. Ford's preliminary hearing, she had de facto judicial authority, which is sufficient to cure any jurisdictional defects.[25] (First Br. at 26-27.) Even if the State is correct,

[25] This if far from obvious, as Mr. Ford is not challenging the original trial court's subject matter jurisdiction by challenging the authority of the original trial judge. Instead, he is challenging the original trial court's jurisdiction because the prosecutor lacked the authority to file the information. The reason the prosecutor lacked such authority is

Mr. Ford would still be entitled to have his conviction vacated, just as the district court ordered. As the Utah Supreme Court explained in Thomas, the de facto authority doctrine does not apply to the first citizen to bring a jurisdictional defect to the court's attention. 961 P.2d at 302. Therefore, the doctrine of de facto authority cannot preclude affording habeas relief to Mr. Ford. This Court should affirm the order vacating Mr. Ford's conviction and sentence.

IV. Mr. Ford Has the Right to Paid Counsel to Defend Against the State's Use of the Judicial Process to Obtain the Legal Authority to Imprison Him

The State's second opening brief addresses the district court's ruling on remand that Mr. Ford is entitled to paid counsel under the Indigent Defense Act, the Utah Constitution, and the United States Constitution. After the district court granted Mr. Ford's pro se habeas petition and vacated his sentence, the State had no legal basis to deprive Mr. Ford of his liberty. The district court provided the State two avenues for dealing with Mr. Ford. First, it could have accepted the district court's proffered opportunity to re-try Mr. Ford, if it could first establish probable cause in a preliminary hearing before a magistrate. (R. 240.) Second, the State could have dropped the case because Mr. Ford had already spent 13 years in prison for possession of a weapon.

The State chose to pursue a third route—to prosecute this appeal and to seek the authority to send Mr. Ford back to prison. Had the State sought to send Mr. Ford back to prison in a new trial, then Mr. Ford unquestionably would have had the right to paid legal representation. As demonstrated below, that right to counsel cannot be extinguished

---

because the court commissioner—as a non-judicial officer—lacked authority to preside over the preliminary hearing. The commissioner's de facto authority cannot cure the jurisdictional defect in the original trial court.

simply because the State has chosen to deprive Mr. Ford of the same liberty through an appellate court instead of a trial court.

From the outset, it is worth noting the scope of the right to counsel at issue in this appeal. The State is correct that the right at issue here concerns very narrow circumstances in which (i) a district court already has granted a habeas petition (or petition for post-conviction relief); (ii) in granting the petition, the court has vacated the legal basis of confinement; and (iii) the State has decided to appeal the district court's ruling in an effort to regain the legal basis of confinement. (Second Br. at 2.) Mr. Ford disagrees with the State that a successful petitioner also must have been released from prison to qualify for the right to counsel recognized by the district court; however, the Court need not resolve this question, as Mr. Ford, in fact, is currently free.

Normally, Mr. Ford would address the statutory argument first, as it is a prerequisite to reaching constitutional issues. However, Mr. Ford agrees with the State's characterization of the Indigent Defense Act ("IDA") as designed to "bring Utah into compliance with its federal constitutional obligations." (Second Br. at 5, 21.) For this reason, Mr. Ford will first outline the constitutional grounds for the right to counsel, beginning with the federal constitution, which defines the minimum obligation Utah has to provide counsel to its citizens, through statute or otherwise.

A. Mr. Ford Has a Federal Constitutional Right to Counsel Because the State is Employing the Judicial Process to Deprive Mr. Ford of His Liberty

Mr. Ford is entitled to paid appointed counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Specifically, the Sixth Amendment right to counsel (as incorporated against the states) and the Fourteenth Amendment rights to

due process and to equal protection require the State to provide Mr. Ford paid counsel on appeal. The State argues that under the United States Constitution there is no right to counsel beyond the first appeal of right from a criminal conviction. The case law indicates otherwise.

1. Ford Has a Sixth Amendment Right to Counsel

A citizen has the right to counsel under the Sixth Amendment when a state employs the judicial process in an attempt to alter the status quo and to deprive the citizen of his liberty on the ground that the citizen has committed a crime. This is precisely what the State is attempting to do here. Currently, the State has no legal basis to imprison Mr. Ford. With its appeal, the State is seeking a legal basis to imprison Mr. Ford for violating a criminal statute forbidding the possession of a dangerous weapon. Under federal case law, Mr. Ford has a right to paid counsel to defend against the State's appeal.

The State argues that the Sixth Amendment right to counsel attaches only during a criminal prosecution and the first level of appellate review. (Second Br. at 32-36.) It buries in a footnote a case that demonstrates otherwise, a case upon which the district court relied, Blakenship v. Johnson, 118 F.3d 312 (5th Cir. 1997). (Second Br. at 35-36 n.11.) The State correctly notes that under normal circumstances the right to counsel ends after the first level of appellate review. There is no right to counsel where a defendant is initiating a discretionary appeal to eliminate the State's legal authority to imprison the defendant. As the United States Supreme Court has explained, "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt

made by a judge or jury below." Ross v. Moffitt, 417 U.S. 600, 610 (1974) (emphasis added).

However, under Blankenship, where the defendant prevails in the first level of appellate review, and the State initiates a discretionary appeal to regain the legal authority to imprison the defendant, then the defendant does have a Sixth Amendment right to counsel. 118 F.3d at 317 (recognizing a Sixth Amendment right to counsel where the "state, rather than the defendant, has requested and obtained the discretionary review").[26] Mr. Ford, as an appellee, is no differently positioned than was Mr. Blankenship, also an appellee. As in Blankenship, the State here is attempting to regain its legal authority to imprison Mr. Ford. Therefore, Mr. Ford has a Sixth Amendment right to counsel to defend against the State's appeal.

The State attempts to distinguish this case from Blankenship by drawing a distinction between civil from criminal. The State argues that the Sixth Amendment right to counsel does not attach in civil proceedings, and that a habeas proceeding is a civil proceeding. (Second Br. at 34-35.) However, the distinction between civil and criminal cannot bear the weight the State places on it.

For example, juvenile proceedings are labeled "civil," and yet the Sixth Amendment right to counsel attaches because the child is "subjected to the loss of his liberty." In re Gault, 387 U.S. 1, 29-30 (1967). This alone demonstrates that the civil/criminal distinction does not determine the scope of the right to counsel. Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981) ("the juvenile has a right to

---

[26] Mr. Ford is not aware of any other case to address a constitutional right to counsel under these circumstances.

appointed counsel even though those proceedings may be styled "civil" and not "criminal").

The State argues that Gault stands only for the "proposition that due process guarantees counsel to a juvenile facing proceedings that equate to a criminal prosecution." (Second Br. at 12.) This argument proves the opposite of what the State supposes. The fact that juvenile proceedings are civil and yet "equate to a criminal prosecution," as the State recognizes, demonstrates that the civil/criminal distinction is not relevant to the scope of the Sixth Amendment right to counsel. In any event, as the Tenth Circuit has noted when discussing the right to counsel, [i]t would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used." Walker v. McLain, 768 F.2d 1181, 1183 (10th Cir. 1985). The distinction between civil proceedings and criminal proceedings cannot distinguish this case from Blankenship.

The State argues that United States Supreme Court case law demonstrates there is no federal right to paid counsel in post-conviction proceedings under any circumstances. (Second Br. at 34.) These cases, however, demonstrate only that there is no right to counsel for a prisoner challenging the legal basis for confinement. Murray v. Giarratano, 492 U.S. 1, 12 (1989) (no right to counsel to prosecute post-conviction petitions in capital cases); Pennsylvania v. Finley, 481 U.S. 551 (1987) (no "right to counsel when mounting collateral attacks") (emphasis added). These cases do not even address—let alone govern—the situation here, where Mr. Ford is defending against the State's attempt to regain the legal basis for confinement.

Because Mr. Ford's conviction and sentence have been vacated, like Mr. Blankenship, Mr. Ford is no longer employing the judicial process to challenge the legal basis of his confinement, because no legal basis exists. Instead, the State is employing the judicial process to reinstate that legal basis so it can send Mr. Ford back to prison to finish the final 2 years of his 15-year sentence. The cases cited by the State do not deal with this situation, but Blankenship does. Mr. Ford has a Sixth Amendment right to counsel. This Court should affirm.

2. Ford Has a Right to Appointed, Paid Counsel Under the Due Process Clause of the Fourteenth Amendment

Mr. Ford also has a right to counsel under the due process clause in the Fourteenth Amendment. If this Court concludes that the Sixth Amendment right to counsel does not apply—even though the legal basis the State seeks to send Mr. Ford to prison is a violation of a criminal statute—then the due process right to counsel does apply. There is no question that the due process clause applies in civil cases; therefore, the State's distinction between civil and criminal is not outcome determinative. Lassiter, 452 U.S. at 24 (recognizing right to counsel in hearings to termination parental rights where the parents' interests are particularly strong and the likelihood of error is particularly high).

The United State Supreme Court weighs the following three factors to determine whether the due process right to counsel attaches: (i) "the private interests at stake;" (ii) "the government's interest;" and (iii) "the risk that the procedures used will lead to erroneous decisions." Id. at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)). These factors weigh in favor of Mr. Ford. First, Mr. Ford has a commanding private interest—his liberty. Second, the government interest in further depriving Mr.

Ford of his liberty is minimal, as Mr. Ford has already served 13 years of a 15 year sentence for possession of a weapon. Moreover, the State's interest here should be aligned with Mr. Ford. Both have an interest in ensuring that citizens are not denied basic constitutional rights. Finally, there is a substantial risk of an erroneous decision if citizens in the position of Mr. Ford are not provided with counsel. The issues presented in the State's appeal are complex, "abtruse, technical [and] unfamiliar" to Mr. Ford, who has no formal legal training. Id. at 29.

The most analogous cases applying these three elements are those involving the revocation of probation or parole. In those cases, the State is similarly reasserting the right to imprison a citizen. Under these circumstances, the right to counsel attaches. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (decision of whether to appoint paid counsel at probation revocation hearing determined on a case-by-case basis); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (decision of whether to appoint paid counsel at parole revocation hearing determined on a case-by-case basis), Vitek v. Jones, 445 U.S. 480 (1980) (plurality) (an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital).

Under this line of cases, the district court did not abuse its direction in ruling that the right to due process requires appointed paid counsel for Mr. Ford to defend against the State's appeal. Mr. Ford is currently free and faces imprisonment if the State is successful with its appeal. Mr. Ford's fundamental liberty interest is therefore in jeopardy. The due process clause requires the appointment of paid counsel for Mr. Ford.

B. Mr. Ford Has a Right to Counsel Under the State Constitution Because the State is Invoking the Judicial Process to Deprive Mr. Ford of His Liberty

The Utah Constitution also provides Mr. Ford the right to paid counsel. Article I, section 12 guarantees "[i]n criminal prosecutions the accused shall have the right to appear to defend in person and by counsel," and article I, section 7 guarantees that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, §§ 7, 12. Much like the right to counsel under the Untied States Constitution, whether this appeal is considered criminal or civil is irrelevant. If the State's appeal is "criminal" in nature—because the State seeks to regain the legal authority to imprison Mr. Ford for violation of a criminal statute—then the article I, section 12 right to counsel applies. If the State's appeal is "civil" in nature—but nonetheless involves the State's attempt to obtain the legal authority to deprive Mr. Ford of his fundamental liberty interest—then article I, section 7 guarantees the right to counsel. Either way, Mr. Ford has the right to counsel under the Utah Constitution.

The Utah Supreme Court has recognized the right to counsel under article I, section 12 in probation revocation hearings. State v. Eichler, 483 P.2d 887, 889 (Utah 1971). In Eichler, the court recognized that—much like petitioners in the post-conviction setting—one on probation is "not entitled to all of the protections the law affords one accused of crime in the first instance." Id. at 888-89. The court nonetheless held that because a revocation of probation carried with it the "possibility of changing the defendant's status from one of being at liberty to one of being in confinement," the right to counsel under article I, section 12 applied. Id. at 889. Importantly, the court held that the question of whether to appoint counsel under article I, section 12 "could well be left

to the discretion of the trial judge, with his action subject to review for abuse of discretion."[27] Id.

Here, the trial court did not abuse its discretion in appointing paid counsel to Mr. Ford. Like Mr. Eichler, Mr. Ford is similarly facing the possibility of having his status changed "from one of being at liberty to one of being in confinement." However, Mr. Ford's liberty interest is stronger than that of a person on probation, as Mr. Ford's release is not conditional. The legal basis for confining Mr. Ford has been extinguished entirely.

The State ignores Eichler and focuses on a case it appears to have overruled, Beal v. Turner, 22 Utah 2d 418, 454 P.2d 624 (1969). (Second Br. at 26.) In Beal, decided two years before Eichler, the court held that the right to counsel does not attach in parole revocation hearings. The sole dissenting justice in Eichler complained that Beal governed, but the majority disagreed. Eichler, 483 P.2d at 890 (Ellett, J., dissenting) ("The case of Beal v. Turner is dispositive of the present matter insofar as the need for counsel is concerned.").

The only other case the State cites—Neel v. Holden, 886 P.2d 1097 (Utah 1994)—involves the right to counsel in a parole grant hearing, an entirely different matter. (Second Br. 27-28.) In parole grant hearings, the prisoner is attempting to gain liberty he currently lacks; whereas in a parole or probation revocation hearing—like here—the State is attempting to obtain the right to take that liberty away.[28] Tellingly, the Neel court

---

[27] This Court subsequently recognized that insofar as the federal right to counsel is concerned, whether the right to counsel attaches in a probation revocation hearing is determined on a case by case basis. State v. Byington, 936 P.2d 1112, 1116 n.3 (Utah Ct. App. 1997). Here, the district court determined the right to counsel attaches.

[28] In addition, the Neel court focused on the non-adversarial nature of a parole grant hearing and had "no desire to turn these hearings into adversarial or confrontational exercises." 886 P.2d at 1103 n.7. The proceedings here are plainly adversarial.

did not cite to Beal, apparently agreeing that it had been overruled in Eichler. If there were no distinction between parole grant hearings and parole revocation hearings with respect to the right to counsel, as the State contends, then Beal would have been controlling authority and would have been cited as such.

The rule emerging from these cases is that whenever the State is attempting to regain the right to imprison on the basis of a violation of a criminal statute, the right to counsel attaches. The fact that this is occurring here in the post-conviction setting is irrelevant. The Utah Supreme Court has suggested that the right to counsel attaches in post-conviction proceedings even where the petitioner is attempting to regain his liberty, but in each instance has declined to resolve the issue expressly. Julian v. State, 966 P.2d 249, 259 (Utah 1998) (Zimmerman, J., concurring) ("defendant should be provided with paid counsel and one state-financed automatic post-conviction proceeding"); Bruner v. Carver, 920 P.2d 1153, 1158 (Utah 1996) (declining to address the issue because it had not been briefed independently of the Sixth Amendment issue); Parsons v. Barnes, 871 P.2d 516, 530-31 (Utah 1994) (Zimmerman, J., concurring) (stating that post-conviction proceedings should be considered criminal in some instances). If the right to counsel to prosecute a post-conviction petition is a close call, then the right to counsel here is not, as the status quo is that the State lacks any legal basis to confine Mr. Ford. Under these circumstances, Mr. Ford has an article I, section 12 right to counsel.

The State cites Hutchings v. State, 2003 UT 52, 84 P.3d 1150 for the proposition that there is no right to counsel in any post-conviction proceedings. (Second Br. at 27.) However, Hutchings involved the right to counsel in an appeal from a parole revocation hearing and in prosecuting a petition for post-conviction relief. 2003 UT 52 at ¶19. Even

so, it did not analyze the question under the Utah Constitution, and instead provides only a single cite to federal law, id. at ¶20, something the State later acknowledges. (Second Br. at 27 n.8.) In addition, Hutchings held that the right-to-counsel claims were procedurally barred. 2003 UT 52 at ¶20. Hutchings does not address the issues presented here.

Insofar as the article I, section 12 right to counsel does not extend in any way to the post-conviction setting, the right to counsel under the due process clause in article I, section 7 applies. The Utah Supreme Court has recognized that due process may require counsel in some circumstances similar to those requiring the right to counsel under the due process clause of the Fourteenth Amendment. Monson v. Carver, 928 P.2d 1017 1029-30, n.13 (Utah 1996). Specifically, the Monson court stated that the due process right to counsel would attach—even in parole grant hearings—where counsel could assist with ensuring "accuracy and reliability" in the proceedings. Id. at 1030. Here, as explained previously, counsel is enormously helpful to appellate courts when they review district court orders granting habeas relief. The State has paid counsel to present its arguments; and prisoners seeking to maintain the relief they have already been granted deserve no less.

As the Utah Supreme Court has explained, courts should fashion a post-conviction remedy whenever required to further "fundamental fairness." Manning v. State, 2005 UT 61, ¶30, 122 P.3d 628. Where a district court has ruled that the legal basis of confinement is void and has therefore vacated the conviction and sentence of a prisoner, it would be fundamentally unfair to expect the (now former) prisoner to defend the district court's ruling in this Court pro se.

The State attempts to avoid this result by arguing that Mr. Ford does not have a liberty interest because, "if the State succeeds [on appeal], it will result merely in reinstating the already imposed punishment." (Second Br. at 30.) This analysis, however, ignores the fact that the right to counsel attaches in probation (and likely parole) revocation hearings, even though they are merely reinstating an already imposed punishment. In addition, the district court's order releasing Mr. Ford is certainly final enough to bestow a liberty interest. If all legal proceedings ended today, Mr. Ford would remain free because his conviction and sentence have been vacated. That makes Mr. Ford's liberty interest at least as great as that of a parolee or a defendant on probation, both of whom still have criminal convictions in place and both of whom are recognized to have a liberty interest sufficient to trigger a federal right to due process. Article I, section 7 provides no less protection.

Regardless of whether these proceedings are labeled as "civil" or "criminal," Mr. Ford has a right to counsel under the Utah Constitution. This Court should affirm.

C. Mr. Ford Has a Right to Counsel Under the IDA Because the State is Invoking the Judicial Process to Deprive Mr. Ford of His Liberty

Mr. Ford also has a statutory right to counsel under the Indigent Defense Act. Mr. Ford agrees with the State that the IDA is designed to "bring Utah into compliance with its federal constitution obligations." (Second Br. at 16.) As set forth above, Mr. Ford does have a federal constitutional right to counsel, and therefore, the IDA should be read to bring the State into compliance with that obligation.

Consistent with the right to counsel under the United States Constitution, the IDA requires that legal counsel be provided "for each indigent who faces the substantial probability of the deprivation of the indigent's liberty." Utah Code Ann. § 77-32-301 (1).

This plain language describes precisely what Mr. Ford—an indigent—faces. The State argues that this language does not apply because it is limited to deprivations of liberty "that will follow from a criminal conviction." (Second Br. at 13.) However, even this narrow reading is satisfied here: If the State succeeds on appeal, its legal basis for sending Mr. Ford to prison is a criminal conviction.

The State next argues that the language does not apply because section 77-32-301(6) excludes from the IDA's reach "subsequent discretionary appeals or discretionary writ proceedings." (Second Br. at 14.) However, this appeal is neither a "subsequent discretionary appeal" nor a "discretionary writ proceeding." This appeal is not discretionary because the State had a right to appeal and this writ proceeding is no longer discretionary as to Mr. Ford because the State is the only party that wishes to proceed.

To avoid this problem, the State cites to Gardner v. Holden, 888 P.2d 608 (Utah 1994) for the proposition that the statutory right to counsel does not attach when defending against the State's appeal. (Second Br. at 15.) However, not only was Gardner a plurality opinion, it also did not address the issue of the right to counsel in the circumstances presented here, as it involved the right to state-funded post-conviction experts and investigators. Although the appeal was taken by the State in Gardner, Gardner was not requesting paid counsel on appeal or for paid investigators for the appeal. Rather, he argued that when he filed for post-conviction relief, he should have been entitled to paid investigators. The court determined that, because of the discretionary nature of the post-conviction petition, Gardner was not entitled to paid investigators or experts, but that under certain circumstances a post-conviction petitioner could be entitled to state compensated investigators and experts. Id. at 622 & n.5. Again,

this analysis does not apply to Mr. Ford's request for paid counsel after the State appealed his successful post-conviction petition. Mr. Ford's participation in this appeal is in no way discretionary. Thus, Gardner provides no support for the State's position.

The State also attempts to avoid the plain language of the IDA by contending that the IDA applies only to criminal cases. Mr. Ford will not repeat the arguments made previously to rebut this contention. It is sufficient to point out that the IDA applies to juvenile proceedings, which are civil proceedings. The important consideration is whether the State is attempting to deprive an indigent's liberty by imprisoning him for having committed a crime. Again, this is precisely what the State seeks to do here.

The State's also attempts to avoid the plain language of the IDA by arguing that a provision in the Post-Conviction Relief Act governs instead. (Second Br. at 18-19.) The PCRA provides that a district court may "appoint counsel on a pro bono basis" to represent a petitioner who files a non-frivolous petition. Utah Code Ann. § 78-35a-109(1). This section is entirely consistent with the IDA and does not supersede it, as the State suggests. (Second Br. at 18 n.3.) The PCRA provision addresses the appointment of counsel for the initial disposition of post-conviction petitions, and the IDA expressly excludes "discretionary writ proceedings." Utah Code Ann. § 77-32-301(6). The very proceedings expressly excluded from the IDA—discretionary writ proceedings—are those covered by the PCRA.

The Court should read these two statutes as harmonious, not as in conflict with one another. Board of Educ. v. Sandy City Corp., 2004 UT 37, ¶9, 94 P.3d 234 ("We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter or related chapters."). The harmonious reading is

that the PCRA allows the district court to appoint counsel once it determines a post-conviction petition is not frivolous; and once the district court grants relief by vacating the conviction and sentence, then the IDA applies because the indigent person now faces "the substantial probability of the deprivation of the indigent's [newly granted] liberty." Utah Code Ann. § 77-32-301 (1). The PCRA does not apply here.

In addition to providing counsel for any indigent person facing a deprivation of liberty, the IDA also provides counsel where a constitutional right has been denied. Utah Code Ann. § 77-32-304(3) ("assigned counsel for an indigent shall be entitled to compensation . . . [where] the indigent has been denied a constitutional right"). A plurality of the Utah Supreme Court recognized this in Gardner. Gardner v. Holden, 888 P.2d 608, 622 n.5 (Utah 1994). Admittedly, the language in Gardner is dicta. However, Gardner is suggestive that the IDA should be read to mean what is says: Once the district court has determined an indigent person's constitutional rights were violated, the IDA recognizes a right to state compensated counsel.[29]

The State's final argument that the IDA is inapplicable here is that Mr. Ford did not satisfy the pre-requisites for the appointment of counsel under the IDA. (Second Br. at 20-22.) Even though the State repeatedly represents that it 'does not represent any" party that has standing to make this argument, (id. at 21, 22 n.4, 23 n. 5), the State nonetheless spends four pages arguing that the district court (i) failed to notify the "responsible entity" under section 77-32-303(1) of the hearing at which it appointed

[29] The State suggests that there is no right to counsel until the State exhausts all appeals because the determination that Mr. Ford's constitutional rights were violated is not "final." (Second Br. at 17.) This cannot be correct. Plainly, once all appeals are exhausted, Mr. Ford would no longer need appointed counsel. And to wait to litigate the issue until that time would needlessly waste judicial resources.

counsel under the IDA and (ii) failed to find a compelling reason to appointing counsel other than SLDA, as required under section 77-32-303. (Second Br. at 20.) Both arguments fail on the merits, even if the State had standing to raise them.

In the district court, the State represented that Salt Lake County was the responsible entity. (Second Br. at 22 n.4.) Now, it is not so sure, offering that perhaps SLDA is the responsible entity. (Second Br. at 21-22.) Regardless, both entities had notice of the hearing.

The district court specifically found that the Salt Lake County District Attorney had notice of the hearing, and the district attorney, unlike counsel for the State, does represent Salt Lake County. (R. 417.) The State has cited to no authority that this notice was defective and has marshaled no evidence to demonstrate the factual finding was clearly erroneous.

In addition, SLDA had notice. SLDA represented Mr. Ford before withdrawing due to a conflict of interest and therefore knew non-contracting counsel was going to be appointed. In addition, SLDA received the same notice as did the district attorney. (R. 393.) Finally, if SLDA was the responsible entity, the only reason to notify it of the hearing would be to ensure there was a compelling reason to appoint counsel other than SLDA. Utah Code Ann. § 77-32-303 (requiring notice to the proper entity "to consider the authorization or designation of the noncontract attorney or resource," including whether "there is a compelling reason to authorize or designate a noncontracting attorney"). However, the district court had already allowed SLDA to withdraw due to a conflict of interest, and therefore, no further evidence from SLDA was required to determine whether there was a compelling reason to designate a noncontracting attorney,

as the district court had already determined there was. Even if the State had standing, its argument concerning notice to the responsible entity fails.

The State's additional contention that a conflict of interest is not a compelling reason to require conflict counsel is puzzling. (Second Br. at 23.) The State speculates that SLDA's contract with Salt Lake County may preclude Mr. Ford's current counsel from serving as counsel. SLDA's contract is not in the record, and the State's speculation about it is irrelevant. In the end, the State has provided no reason to reverse the district court's ruling that Mr. Ford is entitled to counsel appointed under the IDA.

Because with this appeal the State seeks to obtain the legal authority to deprive Mr. Ford of his current liberty interest by sending him to prison, Mr. Ford has a right to paid counsel to defend against the State's appeal under the United States Constitution, the Utah Constitution, and the IDA. The Court should affirm.

CONCLUSION

Mr. Ford served 13 years in prison for possession of a dangerous weapon, even though he was never provided a preliminary hearing under article I, section 13. The State concedes that failure to present a charge to a magistrate in a preliminary hearing precludes the trial court from obtaining subject matter jurisdiction. Here, Mr. Ford never received a preliminary hearing by a member of the judiciary, as required under article I, section 13. Therefore, his original trial court never obtained subject matter jurisdiction to convict and sentence him. The district court did not err when it vacated Mr. Ford's conviction and sentence.

In addition, the legislature's delegation to a court commissioner the authority to conduct a preliminary hearing was unconstitutional under article V, section 1 and article

VII, section 1. Conducting a preliminary hearing is a non-delegable core judicial function, as magistrates enter final judgments and their bindover orders are immediately enforceable. For this additional reason, Mr. Ford's original trial court never obtained subject matter jurisdiction. Even if the commissioner had de facto judicial authority, Mr. Ford is still entitled to relief as the first citizen to bring it to the court's attention. This provides an alternative ground to affirm.

Finally, the district court did not err in appointing paid counsel for Mr. Ford. With this appeal, the State is attempting to deprive Mr. Ford of his current liberty and to send Mr. Ford back to prison. The State's use of the judicial process to strip away such a fundamental liberty interest requires state-appointed counsel under the United States Constitution, the Utah Constitution, and the IDA. The Court should affirm.

DATED this 13th day of February, 2008.

SNELL & WILMER L.L.P.

Troy L. Booher
Attorney for Solomon Lee Ford

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Appellee and was hand-delivered, this 13th day of February, 2008, to the following:

Thomas B. Brunker
Marke Shurtleff
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

SOLOMON LEE FORD,
Petitioner pro se,

v.

STATE OF UTAH,[1]
Respondent.

Decision on Petition for Post-Conviction Relief and State's Motion to Dismiss Petitioner's Petition for Post-Conviction Relief

Case No. 050909964

Judge John Paul Kennedy

The court, having reviewed the papers filed by the respective parties and having listened to the oral arguments by Petitioner acting pro se and by Counsel for the Respondent, hereby renders this decision on the Petition for Post-Conviction Relief and the State's Motion to Dismiss the Petition for Post-Conviction Relief:

Procedural Background:

On August 19, 1993, the State charged the Petitioner Solomon Lee Ford (hereinafter, "Ford" or "the Petitioner") with aggravated assault and possession of a dangerous weapon by a restricted person. Ford's preliminary hearing was held before then Commissioner Frances M. Palacios. Commissioner Palacios bound Ford over for trial on the criminal charges. A jury subsequently convicted Ford on the weapons charge. He was sentenced to prison where he now remains incarcerated.

In March 1995, the Utah Court of Appeals affirmed Ford's conviction in an unpublished opinion. *State v. Ford,* slip op. 940044-CA (March 21, 1995). In that proceeding, Ford did not

[1]The one appropriate respondent in this case is the State of Utah, which was not initially named, but was served. URCP 65C(h). The case title initially included Frances Palacios as Respondent. The court has changed the name of the Respondent as required by the rule.

make any claim that his conviction was unlawful on the basis that he had been bound over by a Commissioner.

On May 20, 1996, Ford filed his first petition for post-conviction relief. Third District Court case number 9600903799. Thereafter, he filed a second petition. Third District Court case number 970905132. In neither case did Ford include a claim that his conviction was illegal because he had been bound over by a Commissioner. Both petitions were dismissed.

A third petition for post-conviction relief was filed on March 12, 1999. The district court in that case adopted the State's summary of the four claims made by Ford, including that "the commissioner lacked authority to preside at [Ford's] preliminary hearing." Again, the State moved to dismiss the petition, which motion was granted by the court (Case number 990902794, March 23, 2000, Hon. Judge Tyrone Medley) which concluded, among other things, that Ford's challenge to the court Commissioner's authority to preside at the preliminary hearing "did not present a challenge to the court's jurisdiction to try petitioner." The district court accepted the State's arguments and, therefore, ruled that Ford's claim was procedurally barred. The court also concluded that allowing a Commissioner (at that time) to preside at a preliminary hearing was not an unconstitutional delegation of judicial authority.

Ford appealed that decision and the Court of Appeals affirmed, holding that Ford's claims were procedurally barred. *Ford v. Kent Morgan*, et al., case no. 20000187-CA (2000). The Utah Supreme Court denied Ford's petition for review. *Ford v. Morgan*, 20 P.3d 403 (Utah 2001). Neither court specifically addressed the jurisdictional issue which Petitioner attempted to raise.

Parties' Current Contentions:

The present petition is Ford's fourth bite at the apple. He again claims that his criminal conviction is void because a court Commissioner had no authority to bind him over to stand trial. In essence, Ford claims that in 1993 a court Commissioner could not lawfully preside at a preliminary hearing. Thus, Ford contends, he was not lawfully bound over, and thus, there was no jurisdiction for the trial court to proceed with the jury trial. Ford therefore claims that his conviction was improper and that he should now be released from custody. Ford asserts that although he raised a claim of no jurisdiction in his third petition, the trial court and the Court of Appeals never ruled on that issue. He contends that jurisdictional issues may be raised at any time and, in order to obtain a ruling, he does so again in this petition..

The State responds to Ford's contentions by arguing that Ford bears the burden of proving a jurisdictional defect, which the State claims he has not done. In the alternative, the State asserts that Ford is now procedurally barred from successfully pressing this claim. In support of this contention, the State notes that Ford raised the jurisdictional issue in his third petition and lost that claim in the district court. Moreover, he failed to raise the jurisdictional issue in his first two petitions even though he could have done so.

The State notes that in the third post-conviction proceeding it conceded that a defect in subject matter jurisdiction would overcome a procedural bar. In this proceeding, however, the State apparently disavows that concession and argues that Ford must demonstrate that a challenge to subject matter jurisdiction cannot be procedurally barred. See fn. 4, State's Supplemental Memorandum (Jan. 24, 2006).

In essence, Petitioner argues that a literal reading of Judge Medley's ruling leaves unclear whether or not, in considering the third petition for relief, the trial court found that Petitioner had raised a jurisdictional issue. While the decision states that "[a] commissioner, when presiding at a preliminary hearing, exercises none of the powers of a judge and does not function as a court of record", and thus concludes that "[a]llowing a court commissioner to preside at a preliminary hearing is not an unconstitutional delegation of judicial authority", it does not address the question which Petitioner raises here. The problem which is alleged here is that the Legislature acting alone could not authorize Commissioners to function as magistrates presiding over preliminary hearings. The State's echo of Supreme Court characterization of the authority of magistrates as being non-judicial does not solve the problem. Further careful reading of Judge Medley's ruling reveals that the precise jurisdictional defect which this court is asked to analyze here was not adequately addressed earlier.

In addition to its other arguments, the State further affirmatively argues that Ford has not established that the Commissioner lacked authority to preside at Ford's preliminary hearing. In support, the State begins this argument by admitting that Ford contends that because the Judicial Council's rules did not authorize a Commissioner to serve as a magistrate, the Commissioner lacked authority to do so in this case. The State also concedes that Utah Code Sec. 78-3-31(9) (1993)(addendum B) required the Judicial Council to establish rules detailing "the types of cases and matters commissioners may hear." Further, the State does not dispute that as of the time of Petitioner's preliminary hearing, no such rules had been adopted by the Judicial Council. But, the State asserts, "nothing in that legislation limits commissioners' duties to those described in any Judicial Council's rules." The State further notes that the term "magistrate" includes a court Commissioner. Supplemental Reply at fn. 4, p. 7, citing Utah Code 77-1-3(4) (1993).

Additionally, the State argues that when Ford's Commissioner presided as a magistrate at his preliminary hearing, she was not unconstitutionally performing a judicial function of a court of record. The State cites *Ohms*, 881 P.2d 844 (Utah 1994), and *State v. Thomas*, 961 P.2d at 299, 303-04 (Utah 1998), for the proposition that the Supreme Court has recognized that Commissioners may perform functions that are "reviewable by a judge" because "ultimate judicial power remains with the judge." The State argues also that in Ford's preliminary hearing, "ultimate judicial power" remained with the trial judge, who had authority to review the Commissioner's probable cause determination subsequent to the bindover and was not required to give any deference to the Commissioner's determination. Moreover, the State notes that the Commissioner's actions were not even subject to appellate review until the district court judge has acted on them. *State v. Humphrey*, 823 P.2d 464, 456-66 (Utah 1991).

Discussion:

The questions presented by this petition and motion to dismiss are (1) whether a Commissioner in 1993 had authority to preside over a preliminary hearing; (2) if the Commissioner did not have such authority, whether the bindover was lawful; and (3) if the bindover was not lawful, did the district court have jurisdiction to try the Petitioner for the alleged crimes. The ultimate question is thus a question of jurisdiction. Jurisdictional questions may indeed be raised at any time and should be raised (even *sua sponte* by the court). *See, Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1151 (Utah 1995).

As stated above, in considering the third petition, the trial court found that Petitioner "had not presented a challenge to the court's jurisdiction to try Petitioner." See decision of Hon. Judge Tyrone Medley in Case no. 990902794. In this fourth petition, the Petitioner has stated unequivocally that he is indeed challenging the jurisdiction of the trial court which tried him on the charges. This court has reviewed carefully the trial court's ruling on the third petition for relief as well as the decision of the Court of Appeals affirming that ruling. In this court's view, neither of those decisions specifically addresses the question raised by Petitioner concerning jurisdiction.

In this proceeding the State "acknowledges that a preliminary hearing and bindover are 'essential to a court's jurisdiction over a felony.'" State's Supp. Memo at 8. But, the State asserts that a "defect" in the preliminary hearing will not render a subsequent conviction void. *Id.* The State continues, contending that Ford "must establish that proceeding on a preliminary hearing before and being bound over by a person who lacked authority to do either equates to having no preliminary hearing at all." *Id.* To support its position, the State cites *Salt Lake City v. Ohms, supra*, where the Supreme Court found that the Legislature had unconstitutionally delegated *judicial* authority to court Commissioners. *Id.* at 48-52. In *Ohms*, the Court did not invalidate prior judgments entered by Commissioners because they had acted with "*de facto* authority." *Id.* at 853-55. The State tries to extend the ruling of the Court in *Ohms* to this case by arguing that the court Commissioner had *de facto* authority to preside at a preliminary hearing and thus, the resulting bindover should be treated as valid, just as the Commissioners' judgments were considered valid in *Ohms*.

In determining the answer to the ultimate jurisdiction question presented here, it is appropriate to begin with reference to Utah Constitution Article I, Sec. 13, which provides in pertinent part:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State . . ..

Hence, the right to a preliminary hearing by a magistrate in felony cases prior to binding the matter over for trial is a constitutional right. This constitutional Section is the foundation for an accused's right to a preliminary hearing before a magistrate.

The right to a preliminary examination is also set forth in the Utah Rules of Criminal Procedure. See Rule 7(h)(1)—(2) (as of 1993):

> (h)(1) A preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. . . .[2]
>
> (h)(2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. . . .[3]

The right of an accused to a preliminary hearing has long been regarded as a "substantial" right. *State v. Pay,* 45 Utah 411, 134 Pac. 632 (1915).

The State in essence asserts that in 1993 it did not matter who conducted this constitutionally-required and rule-mandated proceeding, even though it is a fundamental cornerstone of criminal procedure. Notwithstanding the State's position, however, this court believes that a determination to bind over a defendant for trial is a crucial determination which has the potential to eventually subject a defendant to all of the issues present in a public criminal prosecution. The fact that such a determination may not be immediately appealable makes the role of the magistrate an even more important part of the process. Indeed, the fact that the magistrate's ruling may be reviewed by the trial court, does not make it any less significant.

If, through legislation and without the oversight of the Judicial Branch, any person at all could be given the title of a "magistrate" to preside over a preliminary hearing, then the constitutional right to such a hearing as a part of the criminal prosecution process could become meaningless. Hence, to avoid the problem of holding preliminary hearings before an unauthorized (and perhaps incapable) person, the input of the Judicial Council was a prerequisite for the proper designation of a magistrate. The attempt of the Legislature, acting without concurrence of the Judiciary, to allow a court Commissioner to function as a magistrate in preliminary hearings could not be considered sufficient to grant proper authority to a Commissioner to so act.

---

[2] The current Rule 7(h)(1) states: "If a defendant is charged with a felony, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in district court."

[3] The language of this paragraph is now found in substance in Rule 7(I)(2).

Therefore, because it is necessary for a magistrate to serve only as approved by the Judiciary, it may be stated that a defendant charged with a felony has a right to a preliminary hearing before a "properly authorized" magistrate.

This court thus accepts Petitioner's claim in this case that at the time of his preliminary hearing in 1993, the Legislature had improperly and unlawfully attempted to authorize Commissioners to function as magistrates in preliminary hearings. Petitioner correctly points out that this was done without authority of the Judicial Branch.

In 1993, Utah Code Section 77-1-3 (4) provided:

> "Magistrate" means a justice or judge of a court of record or not of record or a commissioner of such a court appointed in accordance with Section 78-3-31.

However, the 1993 version of Section 78-3-31 did more than describe the procedure and minimum qualifications for appointment of Commissioners. Additionally, it in effect purported to permit Commissioners to act with the authority of a magistrate in misdemeanor cases. *See* subsection (6). While Section 78-3-31(9) deferred to the Judicial Branch operating through the Judicial Council to establish rules "defining the duties and authority of court commissioners for each level of court they serve[,]" the Judicial Council, in 1993, however, had not established any rules defining the duties and authority of court Commissioners and specifically had not allowed a Commissioner to act as a magistrate in a preliminary hearing.

In 1994, the Supreme Court perceived the potential for problems in allowing the Legislature to thus expand the powers of Commissioners without control by the Judicial Branch. In *Salt Lake City v. Ohms, supra*, the Supreme Court ruled that the pre-1995 Utah Code Section 78-3-31 was unconstitutional to the extent that it purported to vest ultimate power of courts of record in persons who have not been duly appointed as Article VIII judges pursuant to the requirements of the Utah Constitution. Specifically, the Court in *Ohms* found that the section violated the Utah Constitution by granting Commissioners the power to enter final judgments and impose sentences in criminal misdemeanor cases. The rejection by the Supreme Court of this attempt by the Legislative Branch to dictate the manner in which Commissioners exercise their authority as magistrates casts a shadow upon the legislative landscape from which the authorizing statute in the present case emerged.

In 1993, Commissioner Palacios conducted the preliminary hearing under the auspices of Utah Code Annotated Section 78-7-17.5, which at the time stated:

> In felony cases, only a judge or a commissioner of a court of record may conduct an initial appearance, preliminary examination, or arraignment.

As already noted, in 1993 there were no rules established by the Judicial Branch (including the Judicial Council) which allowed a Commissioner to exercise authority as a magistrate presiding

over preliminary hearings.[4] Indeed, the procedural rule which described how an accused's right to a preliminary hearing was to be carried out had no reference to Commissioner, but instead cited only to magistrates. *See*, Rule 7, Utah Rules of Crim. Proc. (1993). Without authorization by the Judicial Branch (including authorization by rule of the Judicial Council and tacit approval of the authorization in the Rules of Criminal Procedure) this provision in the Utah Code which dictated who and how a magistrate must exercise his or her authority in affording the protections guaranteed under Article I, Section 13, of the Utah Constitution cannot be upheld as applied to Petitioner's case.

Thus, this court believes that despite the fact that Section 77-1-3(4) included Commissioners within the term of "magistrate," to the extent that the Section, together with Section 78-7-17.5 purported to extend to a Commissioner the authority to function as a magistrate in preliminary hearings, which authority was not sanctioned by any Judicial Council rule, it was unconstitutional. *Cf., Salt Lake City v. Ohms, supra.*

The State contends that despite the fact that the Commissioner in Ford's preliminary hearing was not authorized by rule of the Judicial Council to function as a magistrate presiding over such proceedings, the Commissioner nevertheless acted with *de facto* authority [citing *Ohms, supra*]. Again, this court cannot agree. The theory of *de facto* authority does not fulfill the Petitioner's constitutional right to a preliminary hearing presided over by a properly authorized magistrate when charged with a felony. Unlike the determination of *de facto* authority in *Ohms*, the constitutional rights of criminal defendants charged with felonies cannot and should not be swept away by an assertion of *de facto* authority.

Thus, this court agrees with Petitioner that Commissioner Palacios lacked proper authority to preside over his preliminary hearing in 1993. Having reached this conclusion, the question then arises as to whether Petitioner either in essence waived his right to a preliminary hearing or whether the lack of the Commissioner's authority constituted a "defect" which was waived by Petitioner's failure to object to the matter when he first petitioned for post-conviction relief.

There is no doubt that an accused may waive his right to a preliminary hearing. Utah Constitution Article I, Section 13; U.R.Cr.P. 7(g)(1)(1993); and *see, e.g. State v. Arguelles*, 2001 UT 1, ¶53, 63 P.3d 731. Such a waiver, however, must be knowingly, intelligently, and voluntarily done. Under Article I, Section 13, and Rule 7(g)(1)(1993) such a waiver must also be with the consent of the State. It could be argued that when Petitioner (who was represented by counsel) proceeded to trial following the hearing before Commissioner Palacios, he effectively waived any objection to her lack of authority, and thereby waived his right to a preliminary hearing.

This court, however, does not believe that Petitioner knowingly, intelligently, and voluntarily waived his constitutional right to a preliminary hearing before a properly authorized magistrate. The fact is, Petitioner insisted upon a preliminary hearing. Nor does this court

---

[4] This issue no longer exists inasmuch as presently preliminary hearings are conducted only by Article VIII appointed judges acting as magistrates.

believe that Commissioner Palacios' lack of authority to function as a magistrate constitutes a mere "defect," as the State contends. Rather, from this court's perspective, it would appear that Petitioner was denied a fundamental right to have a preliminary hearing before a duly authorized magistrate.

Without a properly authorized magistrate, there was no valid preliminary hearing. The proceeding before the Commissioner in this case wasn't subject to a mere "defect." The hearing was a nullity. *Cf.*, *State v. Freeman,* 93 Utah 125, 71 P.2d 196 (1937), where the Court observed that a prosecution should not proceed absent the necessary findings by a magistrate who was vested by the Judiciary with authority to conduct the preliminary hearing on the subject charges. Without a valid preliminary hearing, there was no proper bindover to the district court, and the district court thus lacked jurisdiction to require Ford to proceed to trial.

This petition was filed under Rule 65C, which is subject to the requirements of the Post-Conviction Remedies Act, Utah Code Annotated Section 78-35A-101 et seq. Section 78-35A-106 establishes specific requirements regarding what matters are excluded from post-conviction relief. Section 106(1)(d) provides that a defendant is precluded from raising any ground for relief that "was raised or addressed in any previous request for post-conviction relief."

Although Ford attempted to raised the issues under consideration here in his third petition, no prior Court has yet addressed the issue. As noted above, jurisdictional issues can and should be raised at any time. The jurisdiction of various courts is established either directly by the constitution or by authority vested by the constitution in the Judicial Branch, including establishing the powers of its judicial and quasi-judicial officers. To interpret the Post-Conviction Remedies Act as precluding the issue raised in this petition would be nothing less than to exalt that statutory provision above a right created in the Utah Constitution. As was the case in *Ohms, supra*, "it was not within [Ohms'] power to invest by a 'waiver' the right to perform core judicial duties in persons to whom that right has not been granted by Article VIII , section 4." *Id.* at 853. Similarly, it is not within the Legislature's power to divest a petitioner of his Article I, Section 13, right to a preliminary hearing before a properly authorized magistrate, either by granting authority to individuals not authorized to act by the Judicial Branch, or through operation of the Post-Conviction Remedies Act.

If the trial court had ruled in Ford's previous case that the legislature is authorized to delegate the authority to preside over preliminary hearings without the approval of the Judicial Branch, or if the Court of Appeals or the Supreme Court had ruled on this precise jurisdictional issue when the matter was on review, then of course this court would be governed by such a ruling. This did not happen, however, and thus, there is no procedural bar in effect with respect to this issue.

Consequently, in the opinion of this court, Petitioner was wrongfully bound over for trial and the trial court was without jurisdiction to try him. The question remains, however, whether (as suggested by the State) the Petitioner is entitled merely to a new trial, or whether (as demanded by Petitioner) he is entitled to immediate release. Since this particular question has not been fully briefed, the court hereby requests that the State file a brief on this question within

30 days from the date of this Decision. Petitioner shall then have 30 days to respond, and the State an additional 10 days to reply.

Because Petitioner remains impecunious, the court appoints Legal Defense Association to represent him in these proceedings.

Dated: April 25, 2006

By the Court

John Paul Kennedy,
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050909964 by the method and on the date specified.

METHOD	NAME
Mail	SOLOMON LEE FORD PETITIONER UTAH STATE PRISON #22653 P. O. BOX 250 DRAPER, UT 84020
Mail	THOMAS B BRUNKER ATTORNEY DEF 160 E 300 S 6TH FLR POB 140854 SALT LAKE CITY UT 84114-0854

Dated this 25th day of April, 2006.

Deputy Court Clerk

Tab B

Troy L. Booher (9419)
Emily Smith Hoffman (10212)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Email: tbooher@swlaw.com
Email: esmith@swlaw.com

Attorneys for Petitioner Solomon Lee Ford

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

SOLOMON LEE FORD,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

~~[Proposed]~~

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Case No. 050909964

Honorable John Paul Kennedy

Solomon Lee Ford's Motion for Hearing to Appoint Counsel Under the Indigent Defense Act and to Declare Appointed Counsel is Entitled to Compensation for Representing Mr. Ford (the "Motion") was heard on May 31, 2007. Troy L. Booher and Emily Smith Hoffman appeared for Petitioner Mr. Ford, and Thomas Brunker appeared for the State.

Having reviewed and considered the parties' written memoranda and oral arguments, having weighed and considered the evidence received at the hearing on the Motion, and after considering such other and further matters as the Court deems appropriate, the Court hereby

FINDS, CONCLUDES, and ORDERS as follows:

FINDINGS OF FACT

I. Procedural Background

1. On April 25, 2006, the Court granted Mr. Ford's petition for post-conviction relief, ruling that Mr. Ford "was wrongfully bound over for trial and the trial court was without jurisdiction to try him." (4/25/2006 Order at 8.) As a result, the Court vacated Mr. Ford's sentence and conviction. (Id.) The Court also ruled that it would appoint Salt Lake Legal Defenders ("SLDA") to represent Mr. Ford because he was indigent. (Id. at 9.)

2. After briefing from both the State and Mr. Ford, on August 15, 2006, the Court ordered Mr. Ford's immediate release from prison. (8/15/2006 Order.)

3. The State has appealed the Court's April 25, 2006 ruling that granted Mr. Ford's petition for post-conviction relief. (7/10/2007 Notice of Appeal.)

4. On February 2, 2007, SLDA moved to withdraw as counsel due to a conflict of interest. (2/2/2007 Motion to Withdraw as Court-Appointed Counsel.) On March 6, 2007, the State stipulated to entry of an order substituting Mr. Booher as counsel, but objected to any appointment that was other than *pro bono*. (3/5/2007 Response to Motion for Entry of Order Approving Substitution of Counsel.) March 19, 2007, the Court entered an order appointing Mr. Booher as counsel for Mr. Ford, but did not rule on the issue of whether Mr. Booher would serve as paid counsel. (3/19/2007 Order.)

5. On March 12, 2007, Mr. Ford filed a motion to have Mr. Booher appointed as paid counsel. (3/12/2007 Motion for Paid Counsel.) On April 2, 2007, the State opposed the Motion. (4/2/2007 Memorandum in Opposition.) This Motion was heard on May 31, 2007.

II. Mr. Ford Remains Indigent

6. The Court's April 25, 2006 finding that Mr. Ford is indigent remains in place, as Mr. Ford still cannot afford counsel to represent him in response to the State's appeal. The Court bases this finding on the following evidence:

7. Between March 1993 and August ~~1996~~ 2006, Mr. Ford was incarcerated in the Utah State Prison with no means of earning any significant income. (Ford Aff. at ¶3.) At the time the Motion was filed, Mr. Ford worked in the warehouse at Kimball Equipment Company, mostly operating a forklift. (Ford Aff. at ¶5.) Mr. Ford's job pays him $870 every two weeks and is his only source of income. (Id.) Mr. Ford owns no real property, has no savings, and does not have a sufficient credit history to borrow significant sums of money. (Id.)

8. Of the $1,740 Mr. Ford earns every month, $432 is deducted to pay taxes, $400 is used to pay rent, and $200 is used to support Mr. Ford's son, Dejuan Ford. (Ford Aff. at ¶6.) In addition, Mr. Ford spends approximately $400 per month on food and $100 on clothing, mostly for his work, which leaves approximately $208 per month that is discretionary. (Id.)

9. Mr. Ford's $208 per month in discretionary income is not sufficient to pay for legal counsel in light of the likely costs in defending against the State's appeal. The likely cost to respond to the State's appeal is between $15,000 and $45,000. (Sherman Aff. at ¶6.)

10. Based upon the foregoing, Mr. Ford is indigent because he does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving Mr. Ford or his family of food, shelter, clothing, and other necessities.

11. Mr. Ford's status as indigent has not changed since the Court first determined he was indigent on March 25, 2006.

III. The County Had Notice of the Motion and Hearing

12. At the time of the hearing, the Court was aware of the contract between SLDA and Salt Lake County to provide legal services for the indigent.

13. On April 9, 2007, Mr. Ford served all papers relevant to the Motion on the Salt Lake County District Attorney. (4/9/2007 Certificate of Service.)

14. At the hearing, Mr. Booher represented to the Court that his office had mailed a copy of the Notice of Hearing to the Salt Lake County District Attorney on or about May 5, 2007. The Court finds that such notice of the hearing was in fact sent to the County.

15. The County was properly notified of the indigency determination at issue during the May 31, 2007 hearing as well as the hearing itself.

CONCLUSIONS OF LAW

I. Mr. Ford is Entitled to Paid Counsel Under the Indigent Defense Act.

1. Under the Indigent Defense Act, "indigency" is defined as "a person [who] does not have sufficient income, assets, credit, or other means to provide for the payment of legal

counsel and all other necessary expenses of representation without depriving Mr. Ford or his family of food, shelter, clothing, and other necessities." Utah Code Ann. § 77-32-202(3)(a). In determining whether a person is indigent, courts must consider the probable expense and burden of defending against the State; any ownership of, or interest in, any tangible or intangible personal or real property or reasonable expectancy of any such interest, the amounts of any debts; the number and ages of any dependents; and any other relevant factors. Id. at 77-32-202(3)(b). Based upon the facts presented with the Motion and at the Hearing, Mr. Ford remains indigent.

2. Under the Act, an indigent is entitled to paid counsel when he "faces the substantial probability of the deprivation of the indigent's liberty." Utah Code Ann. § 77-32-301(1). Because Mr. Ford's conviction and sentence were vacated, the State's appeal poses a substantial probability of depriving Mr. Ford of a liberty interest. Therefore, Mr. Ford is entitled to paid counsel to defend against the State's appeal under section 77-32-301(1).

3. Under the Act, an indigent is also entitled to paid counsel to prosecute "remedies before or after conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings." Utah Code Ann. § 77-32-301(6). This language permits Mr. Ford paid counsel to pursue a post-conviction remedy insofar as the proceedings are not discretionary as to Mr. Ford. Because it is the State, not Mr. Ford, that has chosen to appeal the Court's ruling and challenge the current status quo, the appeal is not a discretionary proceeding as to Mr. Ford. Therefore, Mr. Ford is entitled to paid counsel to defend against the State's appeal under section 77-32-301(6).

4. The Act applies in the post-conviction setting even though it has the formal label of "civil," as such labels do not determine whether the right to counsel attaches. In re Gault, 387 U.S. 1, 19, 36 (1967).

5. Under the Act, assigned counsel is entitled to compensation if "the indigent has been denied a constitutional right." Utah Code Ann. § 77-32-304(3)(b)(i). In granting Mr. Ford's petition for post-conviction relief, the Court vacated Mr. Ford's conviction and sentence, ruling that Mr. Ford was denied his constitutional right under article I section 13 of the Utah Constitution to be "prosecuted by information after examination and commitment by a magistrate." Therefore, Mr. Ford is entitled to paid counsel to defend against the State's appeal under section 77-32-304(3)(b)(i), which applies in the post-conviction setting. Gardner v. Holden, 888 P.2d 608, 622 n.5 (Utah 1994).

6. The Post Conviction Relief Act does not control whether Mr. Ford is entitled to paid counsel to defend against the State's appeal, but instead merely provides that a court "may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis." Utah Code Ann. § 78-35a-109(1). The PCRA does not preclude appointment of counsel under the Act and does not conflict with the appointment of paid counsel under the Act. The PCRA addresses the appointment of counsel for the initial disposition of post-conviction petitions, whereas the Act expressly excludes "discretionary writ proceedings." Utah Code Ann. § 77-32-301(6). The very proceedings that are expressly excluded from the Act are those covered the PCRA. Therefore, section 78-35a-109(1) does not control the issue presented here.

7. Section 78-35a-109(1) does demonstrate, however, that the prior appointment of SLDA was pursuant to the Act and not the PCRA, as this section prohibits the appointment of

counsel who "represented the petitioner at trial or on the direct appeal," which SLDA did in this case.

8. Under the Act, to appoint non-contract counsel, such as Mr. Booher, a court first must set the matter for a hearing, provide notice of the hearing to the attorney of the responsible county, and make findings that there is a compelling reason to appoint a non-contracting attorney. Utah Code Ann. §§ 77-32-302(2)(e) and -303. The Act defines a "compelling reason" as "a conflict of interest." Id. at § 77-32-201(2). Because SLDA had to withdraw as counsel due to a conflict of interest, there is a compelling reason to appoint non-contracting counsel such as Mr. Booher. The Court set the matter for a hearing on May 31, 2007, and the Salt Lake County District Attorney had notice of the hearing. The elements of sections 77-32-302(2)(e) and 77-32-303 are satisfied, and the Court therefore appoints Mr. Booher as paid counsel under the Act.

II. Mr. Ford is Entitled to Paid Counsel Under the Utah Constitution.

9. Article I, section 7 of the Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." This provision guarantees "fundamental fairness" during court proceedings. Manning v. State, 2005 UT 61, ¶29, 122 P.3d 628. Because Mr. Ford has a fundamental liberty interest of which the State is attempting to deprive him, and because the State has paid counsel to prosecute its appeal, fundamental fairness requires that Mr. Ford also have paid counsel to defend against the State's appeal.

10. Article I, section 12 of the Utah Constitution provides the right to counsel in criminal prosecutions. Because Mr. Ford faces prison if the State is successful on appeal, the State's appeal is functionally equivalent to an original criminal prosecution and the right to counsel attaches.

11. The right to paid counsel under article I, section 12 applies even though this proceeding is post-conviction because if the State is successful in its appeal, Mr. Ford will be punished by being sent back to prison. Von Hake v. Thomas, 759 P.2d 1162, 1167-69 (Utah 1988) (explaining that whether a contempt proceeding is criminal or civil depends upon whether the purpose is to impose punishment). Therefore, Mr. Ford has a right to paid counsel under article I, section 12.

III. Mr. Ford Has A Right To Paid Counsel Under The Federal Constitution.

12. Under the Sixth Amendment to the United States Constitution, one accused of a crime has the right to the assistance of counsel. The United States Supreme Court has held that this right attaches to all critical stages of original criminal proceedings that could result in imprisonment, Gideon v. Wainwright, 372 U.S. 335, 339 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); including a first appeal of right, Douglas v. California, 372 U.S. 353, 357 (1963). For a discretionary appeal following an affirmance of a conviction in a first appeal of right, the right to counsel does not attach because the subsequent appeal is discretionary on the part of the person accused of a crime.[1] Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). However, where a first appeal of right is successful, and the State petitions for discretionary review, the right to counsel does attach because the proceeding is not discretionary as to the person whose liberty interest is in jeopardy. Blankenship v. Johnson, 118 F.3d 312, 317 (5th Cir. 1997). Similarly here, it is the State, not Mr. Ford, that has exercised its discretion to appeal, an appeal that could

[1] Indeed, the Supreme Court has expressly linked the rationale for why there is no Sixth Amendment right to counsel in post-conviction proceedings and in discretionary appeals from the initial right to appeal a criminal conviction. Smith v. Robbins, 528 U.S. 259, 275 (2000).

result in Mr. Ford's imprisonment, and therefore, Mr. Ford's Sixth Amendment right to counsel attaches.

13. Under the Fourteenth Amendment to the United States Constitution, no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has interpreted these provisions to require a state to provide financial assistance, including counsel, when a state seeks to deprive a person of a fundamental liberty interest.[2]

14. While a number of such cases involve original criminal proceedings, the label of "criminal" is irrelevant to whether the right itself attaches. In re Gault, 387 U.S. 1, 50 (1967).

15. Also, the fact that many of these cases involve the payment for resources (such as a transcript) instead of attorney fees makes no difference, as just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. Where there is a fundamental right in jeopardy, a state has an obligation under the Fourteenth Amendment to provide resources, including paid counsel, sufficient to permit one to defend that fundamental right. Because the State seeks to send Mr. Ford to prison with its appeal, the Fourteenth Amendment requires that the appointment of paid counsel to represent Mr. Ford.

---

[2] Griffin v. Illinois, 351 U.S. 12 (1956) (requirement of criminal defendant to procure trial transcript in order to appeal in essence "bolt[ed] the door to equal justice"); Burns v. Ohio, 360 U.S. 252, 253 (1959) (filing fee for motion for leave to appeal from judgment of intermediate appellate court to State Supreme Court must be waived when defendant is indigent); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee to process state habeas corpus application must be waived for indigent prisoner).

ORDER

For the reasons stated above and for good cause appearing,

IT IS HEREBY ORDERED that Mr. Ford's Motion for Hearing to Appoint Counsel Under the Indigent Defense Act and to Declare Appointed Counsel is Entitled to Compensation for Representing Mr. Ford is hereby GRANTED;

IT IS FURTHER ORDERED that Mr. Booher is hereby appointed paid counsel to represent Mr. Ford in response to the State's appeal in this case under the Indigent Defense Act, article I, sections 7 and 12 of the Utah Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution;

IT IS FURTHER ORDERED that Mr. Booher is to serve a copy of this Order on Salt Lake County;

IT IS FURTHER ORDERED that the Clerk of the Court is to send a copy of this Order to Salt Lake County pursuant to Utah Code section 77-32-202(4).

DATED this 25 day of June, 2007.

BY THE COURT:

Judge John Paul Kennedy
District Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

~~Order approved as to form by:~~

By: _____
Thomas Brunker
Assistant Attorney General
for the State

CERTIFICATE OF SERVICE

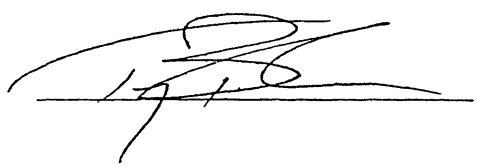
This will certify that on the 22nd day of June, 2007, I caused a true and correct copy of the foregoing to be served on the following by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Thomas B. Brunker
Office of the Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84111

Lisa Collins
Clerk of the Court
Utah Court of Appeals
450 South State Street
Salt Lake City. Utah 84114

Salt Lake County District Attorney
111 East Broadway, #400
Salt Lake City, UT 84111

Salt Lake Legal Defenders Association
424 East 500 South, #300
Salt Lake City, UT 84111



Tab C

THE REVISED STATUTES

OF THE

STATE OF UTAH,

IN FORCE

JAN. 1, 1898.

Revised, Annotated, and Published by Authority of the Legislature,

BY

RICHARD W. YOUNG,
GRANT H. SMITH,
WILLIAM A. LEE,
Code Commissioners.

TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF UTAH, THE ENABLING ACT, AND THE NATURALIZATION LAWS

been actually rendered, and, before allowance, such claims must be presented to the county attorney, who must indorse thereon, in writing, his opinion as to the legality thereof. If the county attorney declare the claim illegal, he must state specifically wherein it is illegal, and the claim must then be rejected by said board. [C. L. § 204*; '96, p. 536*.

536. Officers not to advocate claims of others. No county officer shall, except for his own services, present any claim, account, or demand for allowance against the county, nor in any way advocate the relief asked in the claim or demand made by any other. Any person may appear before the board and oppose the allowance of any claim or demand made against the county. ['96, p. 534.

537. Warrants. Form. Payment. Registration. County charges to be audited. Warrants drawn by order of the board of county commissioners on the county treasury for current expenses during each year, must specify the liability for which they are drawn, when they accrued, and the funds from which they are to be paid, and must be paid in the order of presentation to the treasurer. If the fund is insufficient to pay any warrant, it must be registered, and thereafter paid in the order of registration. Accounts for county charges of every description must be presented to the board of county commissioners, to be audited as prescribed in this title. [C. L. §§ 200, 208; '96, pp. 535, 570.

Warrant must specify liability, § 606 Registering warrants, § 557.

538. County charges, what are. The following are county charges:

1. Charges incurred against the county by virtue of any of the provisions of this title.
2. The necessary expenses of the county attorney, incurred in criminal cases arising in the county, and all other expenses necessarily incurred by him in the prosecution of criminal cases.
3. The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail.
4. The sums required by law to be paid to jurors in civil cases.
5. The accounts of justices of the peace acting at inquests.
6. All charges and accounts for services rendered by any justice of the peace for services in the trial and examination of persons charged with crime, not otherwise provided for by law.
7. The necessary expenses incurred in the support of the county hospitals, poorhouses, and the indigent sick and otherwise dependent poor, whose support is chargeable to the county.
8. The contingent expenses necessarily incurred for the use and benefit of the county.
9. Every other sum directed by law to be raised for any county purposes under the direction of the board of county commissioners, or declared to be a county charge.
10. The fees of constables for services rendered in criminal cases.
11. The necessary expenses of the sheriff and his deputies incurred in civil and criminal cases arising in the county, and all other expenses necessarily incurred by such sheriff or his deputies in the performance of the duties imposed upon them by law.
12. The sums required by law to be paid by the county to jurors and witnesses serving at inquests and in criminal cases in justices' courts. ['96, p. 570-1*.

Board to settle and allow accounts, § 511, sub 7, § 531
The state is not required to pay mileage and attendance of jurors in civil cases Salt Lake County v Richards, 14 U 142; 46 P 659

539. Costs on removal of criminal action before trial. When a criminal action is removed before trial, the costs accruing upon such removal

CHAPTER 4.

COUNTY OFFICERS.

540. Eligibility. No person is eligible to a county, district, or precinct office, who, at the time of his election, is not an elector of the county, district, or precinct in which the duties of the office are to be exercised. ['96, p. 537.

541. Officers enumerated. The officers of a county are: three county commissioners, a county treasurer, a sheriff, a county clerk, a county auditor, a county recorder, a county attorney, a county surveyor, an assessor, a county superintendent of district schools, and such other officers as may be provided by law; *provided*, that in counties having an assessed valuation of less than twenty millions of dollars, the county clerk shall be ex officio auditor of the county and shall perform the duties of such office without extra compensation therefor. ['96, p. 537*.

Salaries of county officers, §§ 2056-2063.

542. Consolidation of offices. In counties where the board of county commissioners, by proper ordinance shall so elect, the duties of the above mentioned officers may be consolidated in such manner as the board may decide; and in counties where the duties of said officers have been or may hereafter be consolidated, the board of county commissioners thereof, by proper ordinance, may elect to separate the duties so consolidated and reconsolidate them in any other manner, or may separate said duties without reconsolidation and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will be best subserved thereby; *provided*, that no such ordinance shall be passed to take effect within less than three months after the passage thereof, and every such ordinance shall take effect on the first Monday of January next succeeding a general election. ['96, p. 537*.

Salary when offices consolidated, § 2063.

543. Id. Duties of person selected. When offices are united and consolidated, but one person shall be elected to fill the offices so united and consolidated, and he must take the oath and give the bond required for and discharge all the duties pertaining to each. ['96, p. 537.

544. Precinct officers. The officers of a precinct are one justice of the peace and one constable. The board of county commissioners of each county, as public convenience may require, shall divide their respective counties into precincts for the purpose of electing justices of the peace and constables. ['96, pp. 537-8*.

Power to change or abolish precincts, § 511, subs. 1, 2.

545. Elections. Terms. Canvass of vote for county superintendent. All elective county and precinct officers, except otherwise provided for in this title, shall be elected at the general election to be held in November, eighteen hundred and ninety-eight, and every two years thereafter, unless otherwise herein provided, and shall take office at twelve o'clock meridian on the first Monday in January next following the date of their election. Commissioners shall be elected as hereinbefore provided. All officers elected under the provisions of this title shall hold office until their successors are elected or appointed and qualified. The judges of election in each school district in which electors are entitled to vote for county superintendent of schools, shall canvass the ballots cast for such officer in such district, and certify the result to the county clerks of

and shall issue to the person receiving the highest number of votes cast at said election for said office, a certificate of election. ['96, p. 538*.

Election of county officers, tie vote, etc., §§ 781, 787 Vacancies filled by county board, § 511, sub. 5. Election of county superintendent, § 1782.

Under an act of congress vacating offices, etc., the governor might appoint a successor to the defendant, a probate judge, elected in 1880 for the term of two years and until his successor should be elected and qualified, no successor having been elected in 1882 in consequence of the provisions of an act of congress. Wenner v. Smith, 4 U. 238; 9 P. 293.

Under section 2018, providing that an incumbent of an office shall hold until his successor be duly elected or appointed and qualified, one holding by appointment will hold over for the succeeding term, if no election occurs at the time provided for by statute People, ex rel. Murphy, v. Haidy, 8 U. 68; 29 P 1118.

546. Deputies and assistants. Every county, precinct, or district officer, except a county commissioner or a judicial officer, may, by and with the consent of the board of county commissioners, appoint as many deputies and assistants as may be necessary for the prompt and faithful discharge of the duties of his office. The appointment of a deputy must be made in writing, and filed in the office of the county clerk, and, until such appointment is so made and filed and until such deputy shall have taken the oath of office, no one shall be or act as such deputy; *provided*, that any officer appointing any deputy shall be liable for all official acts of such deputy; *and provided further*, that the board shall allow the county clerk such deputies and assistants to transact the business pertaining to the district courts as may be deemed necessary and advisable by the judge or judges of the district court. ['96, pp. 538*, 559*.

547. "Principal" includes "deputies." Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies. ['96, p. 539.

Principal may include deputy, § 2498.

548. Offices at county seats, when. The clerks, recorders, and treasurers of all counties, and, except in counties having a population of less than eight thousand, all other county officers, must have their offices at the county seats; and in counties having a population of twenty thousand and over, the clerk, sheriff, recorder, auditor, treasurer, and attorney must keep their offices open for the transaction of business from nine o'clock a. m. until five o'clock p. m. ['96, p. 539.

549. Liability on bond. Whenever, except in criminal prosecutions, any special penalty, forfeiture, or liability is imposed upon any officer for non-performance or mal-performance of his official duties, the liability therefor attaches to the official bond of such officer and to the principal and sureties thereon.

Sup. Cal Codes (1893) p 607. Mont. Pol. C. § 4324.

550. Officer absent from county. No county officer shall absent himself from the county for a period of more than thirty days without the consent of the board of county commissioners. ['96, p. 539.

551. Bonds of county officers. Approval. Sureties. Recording. The board of county commissioners of each county in the state shall prescribe by ordinance the amount in which the following county and precinct officers shall execute official bonds before entering upon the discharge of the duties of their respective offices, viz: county treasurer, county clerk, county auditor, sheriff, county attorney, recorder, assessor, county surveyor, county superintendent of district schools, justice of the peace, and constable; *provided*, that the bond of the county treasurer shall not be fixed in an amount less than one-half the total amount of the taxes collected in the county during the preceding year. The judge or judges of the district court shall prescribe the amount in which each member of the board of county commissioners must execute an official bond before entering upon the discharge of the duties of his office. The bonds and sureties

trict court. The bonds and sureties of all other county and precinct officers must be approved by the board of county commissioners before they can be filed and recorded. All persons offered as sureties on official bonds shall be examined on oath touching their qualifications, and no person shall be admitted as surety on any such bond unless he is a resident and freeholder within this state, and is worth, in real or personal property, or both, situate in this state, the amount of his undertaking, over and above all just debts and liabilities exclusive of property exempt from execution. All official bonds shall be recorded in the office of the county recorder and then filed and kept in the office of the county clerk. The official bond of the county clerk, after being recorded, shall be filed and kept in the office of the county treasurer. [C. L. § 207*; '96, pp. 539–40*.

Power to fix bonds and require renewal, § 511, sub. 3. Official bonds generally, §§ 1682–1686.

552. Officers to complete business at end of term. It shall be the duty of all officers in this title named, to complete the business of their respective offices to the time of the expiration of their respective terms; and, in case an officer at the close of his term shall leave to his successor official labor to be performed for which he has received compensation, or which it was his duty to perform, he shall be liable to pay his successor the full value of such service, which may be recovered in any court of competent jurisdiction. ['96, pp. 568–9.

CHAPTER 5.

COUNTY TREASURER.

553. Duties. The county treasurer shall:

1. Receive all money belonging to the county and all other money by law directed to be paid to him, safely keep the same, and apply and pay it out, and render an account thereof as required by law.

2. Keep an account of the receipts and expenditures of all such money, in books provided for the purpose, in which must be entered the amount, the time when, from whom, and on what account any money was received by him; the amount, time when, to whom, and on what account all disbursements were made by him.

3. Disburse county money only on county warrants issued by the county auditor, except on settlements with the state.

4. Disburse the money in the treasury on such warrants only when they are based on orders of the board of county commissioners, or upon order of the district court, or as otherwise provided by law.

5. File and keep the certificates of the auditor delivered to him when money is paid into the treasury.

6. So keep his books that the amount received and paid out on account of separate funds or specific appropriations are exhibited in separate and distinct accounts, and the whole receipts and expenditures shown in one general or cash account.

7. Perform such other duties as are or may be required by law. [C. L. § 101; '96, p. 540*.

Fees of treasurer, § 975.

554. Auditor's certificate to accompany money. He must receive no money into the treasury except taxes unless accompanied by the certificate of the auditor provided for in chapter eight of this title.

Sup. Cal. C. (1893) p. 609*.

555. Must give receipt. When any money is paid into the county

holding said court. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk. [C. L. §§ 3045-6.

684. Judge pro tempore. Any cause pending in a district court may be tried by a judge pro tempore, who shall be a member of the bar of the supreme court of the state. ['96, p. 94.

Judge pro tempore, Con. art. 8, sec. 5.

685. Id. Appointment. Powers. Whenever all the parties to any cause pending in a district court or their attorneys of record shall enter into a written stipulation appointing a judge pro tempore for the trial of the cause, and the person appointed shall take and subscribe an oath to faithfully try and determine the issues joined between the party or parties plaintiff, naming them, and the party or parties defendant, naming them, and any other parties, if such there be, naming them, it shall be the duty of the clerk of the court in which such action is pending to attach together said stipulation and oath and to place them on file and also to record them at length upon the minutes of the court; whereupon the person appointed shall be vested with the same power and authority and shall be charged with the same duties as to the cause in and as to which he is appointed as though he were the regularly elected and qualified judge of the district court; *provided*, that parties may, by the terms of their stipulation, limit the power of the judge pro tempore to the trial and determination of any specified issue or issues, either of law or fact, and in such case, the oath of the person appointed shall correspond to the terms of the stipulation. ['96, p. 94.

686. Id. Compensation. Judges pro tempore shall serve without compensation from any public treasury, but it shall be lawful for the parties to agree upon and express in their written stipulation any mode or amount of compensation, together with any further agreement as to the taxing of the same as costs. ['96, p. 94.

CHAPTER 4.

JUSTICES' COURTS.

687. Place of residence and of holding court. Every justice of the peace shall reside in and shall hold a justice's court in the precinct or city for which he is elected; *provided*, that where more than one precinct is embraced within the limits of any incorporated city or town, the justices of the peace of such precincts may hold court at any place within their respective cities or towns. [C. L. §§ 3019*, 3042*; '97, p. 263.

688. Civil jurisdiction. The justices' courts shall have civil jurisdiction within their respective precincts or cities:

1. In actions arising on contract for the recovery of money only, if the sum claimed is less than three hundred dollars.

2. In actions for damages for injury to the person, or for taking or detaining personal property, or for an injury to real property where no issue is raised by the answer involving the plaintiff's title to or possession of the same, if the damages claimed be less than three hundred dollars.

3. In actions for a fine, penalty, or forfeiture, less than three hundred dollars, given by statute or by the ordinances of an incorporated city, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine.

4. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed is less than three hundred dollars, though the penalty may exceed that sum. When the payments are to be made by instalments, an

5. In actions to recover the possession of personal property, when the value of such property is less than three hundred dollars.

6. To take and enter judgment on the confession of a defendant, when the amount confessed is less than three hundred dollars. [C. L. § 3020*.

Jurisdiction, etc., Con. art. 8, sec. 8. Jurisdiction of city justice under city ordinances. § 239. Authority to impose a fine in any sum less than three hundred dollars and an imprisonment for a term not exceeding six months, is in excess of the jurisdiction which the legislature could confer on justices of the peace under the organic act. People, ex rel. Yearian, v. Spiers, 4 U. 385; 11 P. 509. The legislature of the territory could confer on justices of the peace no jurisdiction in criminal cases, except that usually exercised by such justices of the peace at the date of the passage of the organic act. Id. Justices of the peace, under the statutes of the territory, have jurisdiction to try an offender charged with the crime of battery. Overruling Yearian v. Spiers, 4 U. 385. People v. Douglass, 5 U. 283; 14 P. 801. A justice of the peace acting within his jurisdiction is not liable for mistakes of judgment, although the facts do not warrant his conclusion. Marks v. Sullivan, 9 U 12; 33 P. 224. A justice of the peace cannc include in his judgment interest on the sur claimed from the time the suit was brought, if i makes the total amount of the judgment excee $300; but the allowance of such interest does nc deprive him of original jurisdiction so as to mak the judgment void and unappealable. On appeal of such judgment the district court may allo interest on the sum claimed, from the time the suit brought, though the judgment, on account of suc allowance, exceeds the amount for which the ju tice could have rendered judgment. McCormic Har. Machine Company v. Marchant, 11 U. 68; P. 483.

Jurisdiction of city justice is co-extensive wit city. Saunders v. Sioux City N. Co., 6 U. 431; P. 532.

689. Concurrent jurisdiction. The justices' courts shall have concu rent jurisdiction with the district courts within their respective precincts an cities:

1. In actions of forcible entry, forcible detainer, or unlawful detainer, whe the whole amount of the rent and damages claimed is less than three hundre dollars.

2. In actions to enforce and foreclose liens on personal property, where th amount of the liens and the value of the property are each less than three hu dred dollars. [C. L. § 3021.

Questions of possession of real property may be adjudicated by justices of peace in forcible entry or detainer actions. Hyndman v. Stowe, 9 U. 33 P. 227.

690. Process to any part of county. Mesne and final process justices' courts may be issued to any part of the county in which they are hel [C. L. § 3022.

691. Criminal jurisdiction. Justices' courts have jurisdiction of th following public offenses committed within the respective counties in whi such courts are established:

1. Petit larceny.

2. Assault or battery not charged to have been committed upon a publ officer in the discharge of his duties, or to have been committed with such inte as to render the act a felony.

3. Breaches of the peace, committing a wilful injury to property, and misdemeanors punishable by a fine less than three hundred dollars, or by impr onment in the county jail or city prison not exceeding six months, or by bo such fine and imprisonment. [C. L. § 3023*.

CHAPTER 5.

DISQUALIFICATION OF JUDGES.

692. When disqualified. Except by consent of all parties, no justi judge, nor justice of the peace shall sit or act as such in any action or proceedir

1. To which he is a party, or in which he is interested.

2. When he is related to either party by consanguinity or affinity within t third degree, computed according to the rules of law.

4607. Magistrate defined. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

Cal. Pen. C. § 807; Mont. Pen. C. § 1373.

4608. Magistrates enumerated. The following persons are magistrates:

1. The justices of the supreme court.
2. The judges of the district courts.
3. Justices of the peace. [C. L. § 4836*.

Cal. Pen. C § 808*.

4609. Peace officers enumerated. A peace officer is a sheriff of a county or his deputy, or a constable, or a marshal or policeman of any incorporated city or town. [C. L. § 5390.

Mont. Pen. C. § 1375*.

CHAPTER 12.

COMPLAINT

4610. What a complaint must state. The complaint must state:

1. The name of the person accused, if known, or if not known and it is so stated, he may be designated by any other name.
2. The county in which the offense was committed.
3. The general name of the crime or public offense.
4. The acts or omissions complained of as constituting the crime or public offense named.
5. The person against whom, or against whose property the offense was committed, if known.
6. If the offense is against the property of any person, a general description of such property. The complaint must be subscribed and sworn to by the complainant.

N. Dak (1895) § 7886; Mont. Pen C § 1590*. Complaint defined, § 4604 Information or complaint must show that a crime has been committed Matter of Catherine Wiseman, 1 U. 39 Criminal complaint may be sworn to upon information and belief U. S. v Eldredge, 5 U. 161; 13 P. 673

4611. Any person having knowledge must make complaint. Every person who has reason to believe that a crime or public offense has been committed, must make complaint against such person before some magistrate having authority to make inquiry of the same.

N. Dak. (1895) § 7887, Mont Pen C. § 1591*. When person concealing crime an accessory, § 4075.

4612. Magistrate must examine complainant. Witnesses. When a complaint is made before a magistrate, charging a person with the commission of a crime or public offense, such magistrate must examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons and may take their depositions. [C. L. § 4837*

N Dak. (1895) § 7888; Mont Pen. C. § 1592*. Complaint of commission of crime in another county; accused being in county where complaint made, § 4630 Complaint, issuance of warrant, § 4615

4613. When arrest made without warrant complaint to be filed. When any officer or other person shall bring any person he has arrested without a warrant before a magistrate, it is the duty of such officer or person to specify the charge upon which he has made the arrest. It is then the duty of the magistrate or the county attorney to make a complaint of the offense charged, and cause the officer or person, or some other person, to subscribe and make oath to such complaint, and file it.

4614. Complainant must name witnesses. Subpœna. Eve person making complaint charging the commission of a crime or public offens must inform the magistrate of all persons whom he believes to have any knowled of its commission, and the magistrate, at the time of issuing the warrant, m issue subpœnas for such persons, requiring them to attend at a specified time a place as witnesses.

N. Dak. (1895) § 7890; Mont. Pen. C. § 1594.

CHAPTER 13.

WARRANT OF ARREST.

4615. Issuance of warrant. Consent of county attorney. Wh a complaint, verified by oath or affirmation, is made before a magistrate, chargi the commission of a crime or public offense, he must, if satisfied therefrom that t offense complained of has been committed, and that there is reasonable ground believe that the accused committed it, issue a warrant for his arrest; but wl the magistrate before whom the complaint is made is a justice of the peace, bef issuing the warrant, the complaint, if made by any person other than the cou attorney of the county, and other evidence taken by such magistrate relating to offense charged, must be submitted to such county attorney, and he must exa ine into the charge and enter either his approval or disapproval of the issuance a warrant upon such complaint. If the county attorney disapproves, no warr shall be issued, but if he approves the issuance of a warrant, such magistrate sh proceed accordingly; *provided*, that in cases when it appears from statements the complaint or other written evidence submitted to the magistrate that accused is likely to escape from the county before the approval of the cou attorney can be had, as hereinbefore prescribed, a warrant may issue without approval of the county attorney. No justice of the peace shall receive any or allowances whatever for any act done or services rendered in a criminal act or proceeding commenced or prosecuted in disregard of the provisions of this tion. [C. L. § 4839*.

N Dak (1895) § 7891*
Form of complaint, § 4610. Magistrate defined, § 4608.

4616. Warrant defined. Form. A warrant of arrest is an orde writing in the name of the state, signed by a magistrate, commanding the ar of the defendant, and may be substantially in the following form:

STATE OF UTAH, }
COUNTY OF ———. }

The state of Utah to any sheriff, constable, marshal, or policeman of said st or of the county of ———:

Complaint on oath having been this day made before me, by A B, that crime of (designating it), has been committed, and accusing C D thereof, you therefore commanded forthwith to arrest the above named C D, and bring before me at (naming the place) or in case of my absence or inability to act, be the nearest or most acces ible magistrate in this county. Dated at ——— ——— day of ———, eighteen ———.

When necessary, the magistrate may insert therein a clause to the effect if the accused has fled from justice, that the peace officer pursue him into other county of this state and there arrest him. [C. L. § 4840.

Cal. Pen. C. § 814*.

4617. Id. Requisites. The warrant must specify the name of the def ant, or, if it is unknown to the magistrate, the defendant may be desig therein by any name. It must also state the time of issuing it, and the cou

4649. Officer arresting with warrant must proceed lawfully. An officer making an arrest in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law. [C. L. § 4866.

Cal Pen C § 848

4650. Arrest without warrant. Delivery of prisoner. Complaint. When an arrest shall be made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken to the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be made before such magistrate. A conductor or other person who shall have made an arrest as provided in subdivision four of section forty-six hundred and thirty-eight, shall, without unnecessary delay, take the person so arrested before any accessible magistrate or deliver him to a peace officer; and a complaint, stating the charge against the person, must be made before such magistrate; and the magistrate before whom such charge shall be made, if the offense is triable by him, shall have full jurisdiction over said offense and the defendant, to try and determine said offense. If he have not jurisdiction to try the defendant for the offense charged, he must proceed as provided in chapter sixteen of this title. [C. L. § 4867.

Cal Pen C § 849*.
Failure to take person arrested before magistrate without delay, a misdemeanor, § 4139

4651. Service of warrant by telegraph. Procedure. Any magistrate may, by an indorsement upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement. [C. L. § 4868.

Cal Pen C § 850*

4652. Id. Certification and return. Every officer causing telegraphic copies of warrants to be sent, must certify as correct and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder. [C. L. § 4869.

Cal Pen C § 851

4653. Officer may direct arrest by telegraph. In all cases when by law a peace officer may arrest a person without a warrant, or, having a warrant for the arrest of a person accused of a public offense, and such person may otherwise escape from this state, such officer may, by telegraph, direct any sheriff, constable, marshal, or policeman in this state to arrest such person, and designate the accused in said order by name, or description, or both.

N Dak (1895) § 7939

4654. Id. Arrest and detention of prisoner. The order may be directed generally to any of such officers, and executed by the officer receiving it. The officer executing any such order shall take into his custody the person designated therein and detain him upon such order for such length of time as shall be necessary for the officer directing the arrest to reach the place of detention by the ordinary means and course of travel, or until sooner demanded by an officer having a warrant for the arrest of such person, but in no case shall the officer arresting such person upon such order detain him longer than the time hereinbefore mentioned.

N Dak (1895) § 7940

CHAPTER 15.

RETAKING AFTER ESCAPE OR RESCUE

4655. Pursuit and rearrest. If a person arrested escapes or is rescued, the person from whose custody he shall have escaped or shall have been rescued, may immediately pursue and retake him at any time and in any place within the state. [C. L. § 4870.

Cal. Pen C § 854
Escapes, §§ 4114–4118 Rescues, §§ 4112, 4113. Justifiable homicide in retaking felon, § 4167

4656. Id. May break door or window. To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling-house or other building, if, after notice of his intention, he is refused admittance. [C. L. § 4871.

Cal. Pen C § 855

CHAPTER 16.

PRELIMINARY EXAMINATION

4657. Magistrate to inform prisoner of his rights. When the defendant shall be brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings. [C. L. § 4872.

Cal. Pen. C. § 858. Rights of accused person, Con. art. 1, secs. 7–12, 13. Defendant by waiving preliminary examination waives all defects in complaint against him U S v. Eldredge, 5 U. 161; 13 P. 673.

4658. Time to procure counsel allowed. Message to counsel. He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose, and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the precinct or the city the defendant may name. The officer must, without delay and without fee, perform that duty. [C. L. § 4873.

Cal. Pen. C. § 859. Right to counsel, Con. art. 1, sec. 12

4659. Examination to be proceeded with. At the time set for the hearing, the magistrate before whom the accused is brought must, unless a change of place of trial is had under the provisions of the next section, immediately after the appearance of counsel, or if none appears, after waiting a reasonable time therefor, if the accused requires the aid of counsel, proceed to examine the case. [C. L. § 4874*.

N Dak. (1895) § 7952
Waiver of preliminary examination with consent of state, Con. art. 1, sec. 13

4660. Change of place of trial. Affidavit. Transfer. Whenever a person accused of a public offense is brought before a justice of the peace for examination and, at any time before such examination is commenced, he files with such justice his affidavit stating that by reason of the bias or prejudice of said justice he believes he cannot have a fair and impartial examination before him, such justice must transfer said action, and all the papers therein, including a certified copy of his docket entries, to another justice of the same county; *provided*, that unless the parties agree upon the justice to whom said action shall be transferred, it shall be sent to the nearest justice of the county, but no more than one change of the place of examination under this section shall be had in an action.

N Dak (1895) § 7953

4661. Limitation on postponement, unless by consent. The examination must be completed at one session, unless the magistrate, for good cause shown, postpone it. The postponement shall not be for more than four days at each time, nor more than twelve days in all, unless by consent or on motion of the defendant. [C. L. § 4875*.

Cal. Pen C. § 861*

4662. Id. Defendant to give bail or be committed. If a postponement is had, the magistrate must commit the defendant for examination, admit him to bail, or discharge him from custody upon the deposit of money as provided in this code, as security for his appearance at the time to which the examination is postponed. [C. L. § 4876.

Cal Pen C § 862 Bail, §§ 4983-5010.

4663. Form of commitment for examination. The commitment for examination shall be made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within named A B, having been brought before me under this warrant, is committed for examination to the sheriff of ———." If the sheriff be not present, the defendant may be committed to the custody of any peace officer. [C. L. § 4877.

Cal. Pen C. § 863

4664. Magistrate must issue subpœnas. The magistrate must issue subpœnas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. [C. L. § 4878.

Cal Pen. C. § 864*.
Accused entitled to compulsory process for witnesses, Con. art. 1, sec. 12.

4665. Procedure on preliminary examination. At the examination the magistrate must first read to the defendant the complaint and the depositions of the witnesses examined on making the complaint, if depositions were taken. [C. L. § 4878*.

Cal. Pen. C. § 864*.

4666. Id. Examination of witnesses in presence of defendant. The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf. [C. L. § 4879.

Cal. Pen C § 865.
Accused entitled to be confronted by witnesses, Con. art. 1, sec. 12; § 4513.

4667. Id. Examination of defendant's witnesses. When the examination of witnesses on the part of the state shall have closed, any witnesses the defendant may produce may be sworn and examined. [C. L. § 4880.

Cal. Pen C § 866.

4668. Id. Exclusion of witnesses. Keeping separate. While a witness shall be under examination, the magistrate may exclude all witnesses who shall not have been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they shall have all been examined. [C. L. § 4881.

Cal Pen C § 867. Exclusion of witnesses and others, § 696.

4669. Id. Exclusion of spectators, etc., on request. The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the county attorney, the defendant and his counsel, and the officer having the defendant in custody. [C. L. § 4882*.

Cal Pen. C. § 868.

4670. When testimony reduced to writing. Form of deposition. The testimony of each witness in cases of homicide must be reduced to writing, as a deposition, by the magistrate, or under his direction; and in other cases upon the demand of the prosecuting attorney. The magistrate before whom the exam[illegible] county attorney, order the

testimony and proceedings to be taken down in shorthand, in all examinations herein mentioned, and for that purpose he may appoint a stenographer. The deposition or testimony of the witness must be authenticated in the following form:

1. It must state the name of the witness, his place of residence, and his business or profession.

2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth; except that in cases where the testimony shall be taken down in shorthand, the answer or answers of the witness need not be read to him.

3. If a question put is objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question shall have been overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or if he refuse to sign it, his reason for refusing must be stated in writing as he gives it, except that in cases where the deposition shall be taken down in shorthand, it need not be signed by the witness.

5. It must be signed and certified by the magistrate when reduced to writing by him, or under his direction, and when taken down in shorthand, the transcript of the stenographer appointed as aforesaid, when written out in longhand, and certified as being a correct statement of such testimony and procedings in the case, shall be prima facie a correct statement of such testimony and proceedings. The stenographer shall, if the defendant is held to answer the charge, within ten days after the close of such examination, transcribe his said shorthand notes into longhand, and certify and file the same with the clerk of the district court of the county in which the defendant shall have been examined, and shall in all cases file his original notes with said clerk. The stenographer's fees shall be paid out of the treasury of the county. [C. L. § 4883*.

Cal Pen. C. § 869*.
Failure of reporter to file transcript does not prevent defendant from being brought to trial where defendant did not claim that he was prejudiced thereby, and did not ask for a continuance in order to secure same. People v. Thiede, 11 U. 241; 39 P. 837. Affirmed, Thiede v. People, 159 U. S. 510.

4671. Custody and disposition of depositions, etc. The magistrate or his clerk must keep the depositions taken, and exhibits admitted as evidence on the examination, until they shall be returned to the proper court; and must not permit them to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney general, county attorney, or other prosecuting attorney, and the defendant and his counsel. [C. L. § 4884.

Cal. Pen. C. § 870.

4672. Id. Violation of preceding section a crime. Every violation of the last section is punishable as a misdemeanor.

N. Dak. (1895) § 7963.

4673. Defendant discharged for want of probable cause. If, after hearing the proofs, it appears that either no public offense has been committed, or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the warrant or the complaint, signed by him, to the following effect: "There being no sufficient cause to believe the within named A B guilty of the offense within mentioned, I order him discharged." [C. L. § 4885*.

Cal. Pen. C. § 871.

4674. Id. When costs taxed against complainant. If the defendant on a preliminary examination for a public offense is discharged as provided in the previous section, and if the magistrate finds that the prosecution was malicious or without probable cause, he shall enter such judgment on his docket and tax

the costs against the complaining witness, which shall be enforced as judgments for costs in criminal cases, and execution may issue therefor.

N Dak (1895) ¿ 7965

4675. When defendant held to answer. Order. If, however, it appear from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the complaint an order, signed by him, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within named A B guilty thereof, I order that he be held to answer to the same." [C L § 4886*.

Cal Pen C ¿ 872*

4676. Id. Order when offense not bailable. If the offense is not bailable, the following words, or words to the same effect, must be added to the indorsement: "And that he is hereby committed to the sheriff of the county of ———." [C. L. § 4887.

Cal Pen C ¿ 873

4677. Id. Order when bail has been taken. If the offense is bailable, and bail is taken by the magistrate, the following words must be added to the aforementioned indorsement: "And I have admitted him to bail to answer by the undertaking hereto annexed." [C. L. § 4888.

4678. Id. Order when offense bailable. If the offense is bailable and the defendant is admitted to bail, but bail shall not have been given, the following words must be added to the order indorsed on the complaint: "And that he is admitted to bail in the sum of ——— dollars, and is committed to the sheriff of the county of ——, until he gives such bail, or is legally discharged." [C. L. § 4889.

Cal Pen C ¿ 875* Bail, ¿¿ 4983-5010

4679. Commitment to be delivered with defendant. If the magistrate orders the defendant to be committed, he must make out a commitment, signed by himself, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment. [C. L. § 4890.

Cal Pen C ¿ 876

4680. Id. Form of. The commitment must be to the following effect:

STATE OF UTAH, }
COUNTY OF ———. }

The state of Utah to the sheriff of the county of ———:

An order having been this day made by me that A B be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated at ———, this ——— day of ———, 18—— [C. L. § 4891.

Cal. Pen C ¿ 877

4681. Witnesses may be required to give bonds. On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the state a written undertaking, without surety, to the effect that he will appear and testify at the court to which the complaint and depositions are to be sent, or that he will forfeit the sum of two hundred dollars. [C. L. § 4892.

Cal. Pen. C. ¿ 878*

4682. Id. Sureties may be required. When the magistrate or a judge of the court in which the action is pending shall be satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the last section. [C. L. § 4893.

Cal Pen C ¿ 879

4683. Id. When witness is a minor. When a minor is a material witness, any other person may be allowed to give an undertaking for the appearance of such witness; or the magistrate may, in his discretion, take the undertaking of such minor in a sum not exceeding fifty dollars, which shall be valid and binding in law, notwithstanding the disability of minority.

Mont Pen C ¿ 1690*

4684. Id. Commitment for failure to give. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged. [C. L. § 4894.

Cal Pen C ¿ 881.

4685. Examination of witness unable to give bond. When, however, it shall satisfactorily appear, by examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the state. Such examination must be by question and answer, in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this code to be conducted, and the witness must thereupon be discharged; but this section shall not apply to an accomplice in the commission of the offense charged. [C. L. § 4895.

Cal. Pen. C. ¿ 882 Use of such testimony, ¿ 4513

4686. Magistrate must return papers to district court. When a magistrate shall have discharged a defendant, or shall have held him to answer, he must return without delay, to the clerk of the court at which the defendant is required to appear, the warrant if any, the complaint, the depositions if any, a list of the names and the postoffice addresses of all witnesses for the state, if he can ascertain them, and all undertakings of bail and for the appearance of witnesses taken by him, together with a certified copy of the record of the proceedings as it appears on his docket. [C. L. § 4896; '96, p. 312.

Cal. Pen. C. ¿ 883*

4687. When defendant a convict. Examination in prison. When the defendant is a convict in the state prison, or a prisoner in a county jail, the examination may be held in the office of the prison or jail. In such cases the commitment shall be directed to the warden of the prison or to the keeper of the jail. ['96, p. 271*.

CHAPTER 17.

PROSECUTION BY INFORMATION, INDICTMENT, OR ACCUSATION.

4688. Prosecutions in district court to be by information, etc. All public offenses triable in the district courts, except cases appealed from justices' courts, must be prosecuted by information or indictment, except as provided in the next section. [C. L. § 4897*.

Cal Pen C ¿ 888*.
Prosecution by information or indictment, Con. art. 1, sec 13, ¿ 4509.